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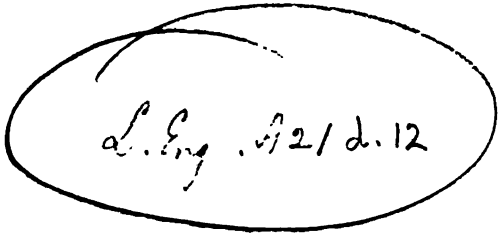

WILSON'S

SUPREME COURT OF JUDICATURE ACTS.

WILSON'S

SUPREME COURT OF JUDICATURE ACTS,

APPELLATE JURISDICTION ACT, 1876,

RULES OF COURT AND FORMS.

WITH OTHER

ACTS, ORDERS, RULES, AND REGULATIONS

RELATING TO

THE SUPREME COURT.

WITH PRACTICAL NOTES.

THIRD EDITION.

By M. D. CHALMERS,
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

ASSISTED BY

HERBERT LUSH-WILSON,
OF THE INNER TEMPLE BARRISTER-AT-LAW

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PREFACE

TO THE THIRD EDITION.

In this edition the notes of cases have been brought up to date, and there have been added to the former text the Supreme Court of Judicature (Officers) Act, 1879, the Supreme Court of Judicature Act, 1881, and the Rules, Forms, and Orders in Council since 1878, also the Winter and Spring Assizes Acts, and the Practice Masters' Rules for the Central Office.

June, 1882.

PREFACE TO THE FIRST EDITION.

A FEW words in explanation of the plan of this book may facilitate its use.

The Supreme Court of Judicature Act, 1873, contains enactments affecting, first, the organization of the Court; secondly, the substance of the law; thirdly, Procedure; though as this division is far from an exact one many sections properly fall under more than one of these heads. The Act of 1875 contains in the main alterations of or additions to the earlier Act in points falling under the first two heads; but it also contains sections affecting procedure, as well as some miscellaneous matters. The Schedule of Rules appended to the latter Act contains the great bulk of the provisions relating to Procedure.

The enactments to be considered being thus scattered over two Acts and a Schedule, besides some additional Rules since issued, I have endeavoured to find a plan by which, without departing from the sequence of the Acts, or attempting to consolidate what the Legislature has not consolidated, a reader may yet always be enabled to find the whole of the provisions upon any one subject grouped together. Accordingly in handling the Act of 1873, those sections which deal with Procedure have been merely given in their order, with seldom more than a reference to the rules relating to the same subject. But under each of the sections which affect the organization of the Courts, or matters of substantive law, it has been sought to show the whole of the provisions of the new legislation upon the subject matter. Any parts of the section repealed are indicated by italics; the

substituted or amending section of the latter act is printed underneath ; and such notes are added as seemed likely to be useful. In like manner, in dealing with the Schedule of Rules, all sections of either Act relating to Procedure are reprinted immediately after the Rules upon the same subject. This method involves printing many things twice over. But it seems to secure that a reader can commonly find the whole of the provisions he wants at once.

The Rules of Procedure in the Acts and Schedule are in some cases entirely new. Where this is so I have pointed it out, and, if it seemed necessary, endeavoured to explain their effect. In some cases they are adopted from the existing rules of some of the Courts, but with substantial modifications. In such cases I have sought to show the effect of the modifications, and for that purpose it has sometimes been necessary to examine in considerable detail the existing practice and past decisions. In many cases, again, a rule is simply adopted without alteration from that hitherto in force either in the Common Law Courts or in Chancery. In such cases I have thought it best merely to show the source from which the rule is taken, and the books in which it may be found discussed, and not to set out the decisions and authorities affecting it. Any other course was unnecessary, for all that is needed has already been done in Mr. Day's edition of the Common Law Procedure Acts, and Mr. Osborne Morgan's Chancery Acts and Orders. And it would have been almost impossible to go over the ground already traversed by those writers without unduly appropriating the fruits of other men's labours.

I am indebted to my learned friend, Mr. W. M. Fawcett, of the Chancery Bar, for reading the sheets of this book during its progress through the press, and for many valuable suggestions. And I have to thank my learned friend, Mr. Francis Parker, of the Home Circuit, for the preparation of the Index.

ARTHUR WILSON.

TEMPLE,
September, 1875.

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SUPREME COURT OF JUDICATURE ACT, 1873.

36 & 37 VICT. c. 66.

[NOTE.—*The Sections and parts of Sections printed in Italic type are repealed.*]

An Act for the constitution of a Supreme Court, and for other purposes relating to the better Administration of Justice in England; and to authorize the transfer to the Appellate Division of such Supreme Court of the Jurisdiction of the Judicial Committee of Her Majesty's Privy Council. Act 1873, s. 1.

[5th August, 1873.]

WHEREAS it is expedient to constitute a Supreme Court, and to make provision for the better administration of justice in England:

And whereas it is also expedient to alter and amend the law relating to the Judicial Committee of Her Majesty's Privy Council:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PRELIMINARY.

1. This Act may be cited for all purposes as the "Supreme Court of Judicature Act, 1873." Sect. 1. Short title

This Act is referred to as the "principal Act," in the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77); and these two and the Act of 1877 may be cited together as "The Supreme Court of Judicature Acts, 1873, 1875, and 1877," and these three and the Act of 1879 may be cited together as "The Supreme Court of Judicature Acts, 1873 to 1879." (See Act of 1875, s. 1, *post*, p. 95, and Act of 1877, s. 1, *post*, p. 142, and Act of 1879, s. 1, *post*, p. 144). The Act of 1881 does not contain any similar provisions.

H

Act 1873, ss. 2, 3.

Sect. 2. Commencement of Act.

This Act, except any provision thereof which is declared to take effect on the passing of this Act, shall commence and come into operation *on the second day of November*, 1874.

By the Supreme Court of Judicature (Commencement) Act, 1874 (37 & 38 Vict. c. 83), the period for the coming into operation of the Act of 1873 was postponed to the 1st November, 1875. By s. 2 of the Act of 1875, *post*, p. 95, the operation of ss. 20, 21, and 55, *post*, pp. 16, 17, 63, dealing with appeals to the House of Lords, was postponed to the 1st November, 1876; and those sections are now repealed by s. 24 of the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), *post*, p. 140.

Ss. 27, 60, 61, and 68, of the Act of 1873, *post*, pp. 37, 65, 66, 73, came into operation on the passing of the Act. But s. 68 was superseded by s. 17 of the Act of 1875, and repealed by s. 33 (see *post*, pp. 109, 125, 126); and s. 17 of the Act of 1876, *post*, p. 136, as modified by s. 19 of the Act of 1881, alters the constitution of the body to which the making of rules is entrusted.

PART I.

CONSTITUTION AND JUDGES OF SUPREME COURT.

Sect. 3. Union of existing Courts into one Supreme Court.

3. From and after the time appointed for the commencement of this Act, the several Courts hereinafter mentioned (that is to say), The High Court of Chancery of England, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, *and the London Court of Bankruptcy*, shall be united and consolidated together, and shall constitute, under and subject to the provisions of this Act, one Supreme Court of Judicature in England.

Divorce.

Although the Divorce Court is consolidated with the Supreme Court, and its jurisdiction transferred to the High Court (sec. 16, *post*, p. 9), divorce and matrimonial causes are expressly exempted from the operation of the Rules of Procedure (O. I., r. 1; O. LXII., *post*, pp. 175, 443; and the practice in all such causes remains unaltered.

Bankruptcy.

By ss. 9 and 33 of the Act of 1875, *post*, pp. 101 and 125, so much of this section as relates to the Bankruptcy Court is repealed. The court is left a separate court; and it is provided, by s. 9, that the office of Chief Judge in Bankruptcy shall be filled by a Judge of the High Court. As to the line of demarcation between the jurisdiction of the High Court and the jurisdiction of the Bankruptcy Court, see *Eyre* v. *Smith*, 2 C. P. D. 435 C. A.; *Ex parte Yates*, 11 Ch. D., 148 C. A.; *Ex parte Musgrave*, 10 Ch. D. 94 C. A.; *Barter* v. *Dubeux*, 7 Q. B. D. 413 C. A.

Act 1873, ss. 4, 5.

Sect. 4. Division of Supreme Court into a Court of original and a Court of appellate jurisdiction.

4. The said Supreme Court shall consist of two permanent Divisions, one of which, under the name of "Her Majesty's High Court of Justice," shall have and exercise original jurisdiction, with such appellate jurisdiction from inferior Courts as is hereinafter mentioned, and the other of which, under the name of "Her Majesty's Court of Appeal," shall have and exercise appellate jurisdiction, with such original jurisdiction as hereinafter mentioned as may be incident to the determination of any appeal.

The first-mentioned Court is designated "The High Court of Justice" throughout the Forms appended to the Act of 1875, and is so termed in practice. The other Court is called in practice "The Court of Appeal," and is referred to by that name in the Appellate Jurisdiction Act, 1876.

As to the appellate jurisdiction of the High Court, see ss. 45 and 47, *post*, pp. 55, 58; and s. 15 of the Act of 1875, *post*, p. 108.

As to the jurisdiction of the Court of Appeal, see ss. 18 and 19, *post*, p. 13, and notes thereto; and O. LVIII., *post*, p. 417.

Sect. 5. Constitution of High Court of Justice.

5. Her Majesty's High Court of Justice shall be constituted as follows:—The first Judges thereof shall be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, the several Vice-Chancellors of the High Court of Chancery, the Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes, the several Puisne Justices of the Courts of Queen's Bench and Common Pleas respectively, the several Junior Barons of the Court of Exchequer, and the Judge of the High Court of Admiralty: except such, if any, of the aforesaid Judges as shall be appointed ordinary Judges of the Court of Appeal.

Subject to the provisions hereinafter contained, whenever the office of a Judge of the said High Court shall become vacant, a new Judge may be appointed thereto by Her Majesty, by Letters Patent. All persons to be hereafter appointed to fill the places of the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron, and their successors respectively, shall continue to be appointed to the same respective offices, with the same precedence, and by the same respective titles, and in the same manner, respectively as heretofore. Every Judge who shall be appointed to fill the place of any other Judge of the said High Court of Justice *shall be styled*

Act 1873, s. 5.

in his appointment "Judge of Her Majesty's High Court of Justice," and shall be appointed in the same manner in which the Puisne Justices and Junior Barons of the Superior Courts of Common Law have been heretofore appointed: *Provided always, that if at the commencement of this Act the number of Puisne Justices and Junior Barons who shall become Judges of the said High Court shall exceed twelve in the whole, no new Judge of the said High Court shall be appointed in the place of any such Puisne Judge or Junior Baron who shall die or resign while such whole number shall exceed twelve, it being intended that the permanent number of Judges of the said High Court shall not exceed twenty-one.*

All the Judges of the said Court shall have in all respects, save as in this Act is otherwise expressly provided, equal power, authority, and jurisdiction; and shall be addressed in the manner which is now customary in addressing the Judges of the Superior Courts of Common Law.

The Lord Chief Justice of England for the time being shall be President of the said High Court of Justice in the absence of the Lord Chancellor.

By the Act of 1877, s. 4, *post*, p. 143, the style of the Puisne Judges of the High Court is "Justices of the High Court."

By the Act of 1875, s. 3, *post*, p. 95, the proviso printed in italics was repealed; and the Lord Chancellor is not to be deemed a permanent Judge of the High Court, and the provision as to appointment and style is not to apply to him.

S. 15 of the Act of 1876, *post*, p. 134, provided for the transfer of three Judges from the High Court to the Court of Appeal; and the vacancies so occasioned were not to be filled up except in the cases and to the extent provided for by s. 18 of the same Act. (See *post*, p. 137.) The Act of 1877, s. 2, *post*, p. 142, authorized the appointment of an additional Judge of the High Court: who, by s. 3, *post*, p. 142, is attached to the Chancery Division, subject to the power of removal to another division, and by s. 6 of the Act of 1881, *post*, p. 164, power is given to make such appointment from time to time, subject to the limitations therein specified.

By s. 32 of the Act of 1873, *post*, p. 41, the distinctive office of either of the Chief Justices, the Chief Baron, or the Master of the Rolls, may be abolished upon a vacancy occurring; and by Order in Council, dated 16th December, 1880, *post*, p. 43, the offices of Chief Justice of the Common Pleas and Chief Baron have been abolished.

By s. 2 of the Act of 1881 the Master of the Rolls is made a judge of the Court of Appeal only, and by s. 5 of the same Act an additional Judge of the High Court is to be appointed in his place. See *post*, pp. 162, 163.

By s. 4 of the Act of 1881, *post*, p. 163, the President of the Probate Division is made an ex-officio member of the Court of Appeal.

As to the Judge of the Admiralty Court, see Act of 1875, s. 8, *post*, p. 99. Act 1873, ss. 5—10.

6. [*Constitution of Court of Appeal.*] Sect. 6.

This section is repealed by the Act of 1875, *post*, pp. 125, 127. And the constitution of the Court of Appeal is governed by s. 4 of that Act, as modified by s. 15 of the Act of 1876.

7. The office of any Judge of the said High Court of Justice, or of the said Court of Appeal, may be vacated by resignation in writing, under his hand, addressed to the Lord Chancellor, without any deed of surrender; and the office of any Judge of the said High Court shall be vacated by his being appointed a Judge of the said Court of Appeal. The said Courts respectively shall be deemed to be duly constituted during and notwithstanding any vacancy in the office of any Judge of either of such Courts. Sect. 7. Vacancies by resignation of Judges, and effect of vacancies generally.

As to the vacancies caused by the transfer of Judges from the High Court to the Court of Appeal, under s. 15 of the Act of 1876, see notes to s. 5, *supra*, and *post*, p. 137. See also ss. 3 and 6 of the Act of 1881, *post*, pp. 163, 164.

8. Any barrister of not less than ten years' standing shall be qualified to be appointed a Judge of the said High Court of Justice; and any person who if this Act had not passed would have been qualified by law to be appointed a Lord Justice of the Court of Appeal in Chancery, or has been a Judge of the High Court of Justice of not less than one year's standing, shall be qualified to be appointed an ordinary Judge of the said Court of Appeal: Provided, that no person appointed a Judge of either of the said Courts shall henceforth be required to take, or to have taken, the degree of Serjeant-at-Law. Sect. 8. Qualifications of Judges. Not required to be Serjeants-at-Law.

By 14 & 15 Vict. c. 83, s. 1, any barrister of fifteen years' standing might be appointed a Lord Justice.

9. [*Tenure of office of Judges, and oaths of office. Judges not to sit in the House of Commons.*] Sect. 9.

This section is repealed by the Act of 1875, *post*, pp. 125, 127, and s. 5 of the Act of 1875 is substituted for it.

10. [*Precedence of Judges.*] Sect. 10.

This section is repealed by the Act of 1875, *post*, pp. 125, 127, and s. 6 of that Act is substituted for it, see *post*, p. 98.

Act 1873, ss. 11, 12.

Sect. 11. Saving of rights and obligations of existing Judges.

11. Every existing Judge, who is by this Act made a Judge of the High Court of Justice or an ordinary Judge of the Court of Appeal, shall, as to tenure of office, rank, title, salary, pension, patronage, and powers of appointment or dismissal, and all other privileges and disqualifications, remain in the same condition as if this Act had not passed; and subject to the change effected in their jurisdiction and duties by or in pursuance of the provisions of this Act, each of the said existing Judges shall be capable of performing and liable to perform all duties which he would have been capable of performing or liable to perform in pursuance of any Act of Parliament, law, or custom, if this Act had not passed. No Judge appointed before the passing of this Act shall be required to act under any Commission of Assize, Nisi Prius, Oyer and Terminer, or Gaol Delivery, unless he was so liable by usage or custom at the commencement of this Act.

Service as a Judge in the High Court of Justice, or in the Court of Appeal, shall, in the case of an existing Judge, for the purpose of determining the length of service entitling such Judge to a pension on his retirement, be deemed to be a continuation of his service in the Court of which he is a Judge at the time of the commencement of this Act.

As to the meaning of "existing," see s. 100, *post*, p. 94; and as to the obligation to go circuit, &c., of the additional ordinary Judges of Appeal appointed under the Act of 1876, see s. 15 of that Act, *post*, p. 135.

By s. 8 of the Act of 1875, *post*, p. 99, the positions of the existing Admiralty Judge and Registrar are regulated, and provision is made for the terms on which their successors are to be appointed.

The amending section, first, places the Judge of the Admiralty Court, on his electing to accept the prescribed conditions, on the same footing with the other Judges of the High Court. Secondly, it regulates the position of the Admiralty Registrar in respect of the matters specified. Thirdly, it imposes upon any judge henceforth to be appointed to the Probate, Divorce, and Admiralty Division, the duty of going circuit, and taking part in the sittings for jury trials in London and Middlesex.

Sir R. J. Phillimore, the then Judge of the Admiralty Court, elected to accept the prescribed conditions.

As to the appointment of judges and officers of Vice-Admiralty Courts, see s. 23 of the Act of 1876, *post*, p. 140.

Sect. 12. Provisions for extraordinary duties

12. If, in any case not expressly provided for by this Act, a liability to any duty, or any authority or power, not incident to the administration of justice in any

Act 1873, ss. 12, 13.

Court, whose jurisdiction is transferred by this Act to the High Court of Justice, shall have been imposed or conferred by any statute, law, or custom, upon the Judges or any Judge of any of such Courts, save as hereinafter mentioned, every Judge of the said High Court shall be capable of performing and exercising, and shall be liable to perform and empowered to exercise every such duty, authority, and power, in the same manner as if this Act had not passed, and as if he had been duly appointed the successor of a judge liable to such duty, or possessing such authority or power, before the passing of this Act. Any such duty, authority, or power, imposed or conferred by any statute, law, or custom, in any such case as aforesaid, upon the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, or the Lord Chief Baron, shall continue to be performed and exercised by them respectively, and by their respective successors, in the same manner as if this Act had not passed.

of Judges of the former Courts.

By s. 25 of the Act of 1881, *post*, p. 172, any special statutory power or duty heretofore exercised or performed by the Chief Justice of the Common Pleas or Chief Baron of the Exchequer may now be exercised or performed by the Lord Chief Justice of England.

Sect. 13.

13. Subject to the provisions in this Act contained with respect to existing Judges, there shall be paid the following salaries, which shall in each case include any pension granted in respect of any public office previously filled by him to which the Judge may be entitled :

Salaries of future Judges.

To the Lord Chancellor, the sums hitherto payable to him ;

To the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, the same annual sums which the holders of those offices now respectively receive ;

To each of the ordinary Judges of the Court of Appeal, and to each of the other Judges of the High Court of Justice, the sum of five thousand pounds a year.

No salary shall be payable to any additional Judge of the Court of Appeal appointed under this Act ; but nothing in this Act shall in any way prejudice the right of any such additional Judge to any pension to which he may be by law entitled.

Act 1873, ss. 13—15. This section, so far as it relates to additional Judges of the Court of Appeal, is repealed by s. 33 of the Act of 1875, *post*, pp. 125, 127.

As to "existing," see s. 100, *post*, p. 94.

Sect. 14. Retiring pensions of future Judges of High Court of Justice, and ordinary Judges of Court of Appeal.

14. Her Majesty may, by Letters Patent, grant to any Judge of the High Court of Justice, or to any ordinary Judge of the Court of Appeal who has served for fifteen years as a Judge in such Courts, or either of them, or who is disabled by permanent infirmity from the performance of the duties of his office, a pension, by way of annuity, to be continued during his life:

In the case of the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, the same amount of pension which at present might under the same circumstances be granted to the holder of the same office:

In the case of any ordinary Judge of the Court of Appeal or any other Judge of the High Court of Justice, the same amount of pension which at present might under the same circumstances be granted to a Puisne Justice of the Court of Queen's Bench.

As to length of service and pensions of "existing" and transferred Judges, see also s. 11, *ante*, p. 6; and s. 15 of the Act of 1876, *post*, p. 134. The pensions of the various Judges referred to are regulated by numerous statutes which are indexed in the official Index to the Statutes under the heading Supreme Court of Judicature, England, 1 (*a*), 1 (*b*), and 2 (*b*).

Sect. 15. Salaries and pensions: how to be paid.

15. Subject to the provisions in this Act contained with respect to existing Judges, the salaries, allowances, and pensions payable to the Judges of the High Court of Justice, and the ordinary Judges of the Court of Appeal respectively, shall be charged on and paid out of the Consolidated Fund of the United Kingdom of Great Britain and Ireland, or the growing produce thereof: such salaries and pensions shall grow due from day to day, but shall be payable to the persons entitled thereto, or to their executors or administrators, on the usual quarterly days of payment, or at such other periods in every year as the Treasury may from time to time determine.

Act 1873, s. 16.

PART II.

JURISDICTION AND LAW.

Sect. 16. Jurisdiction of High Court of Justice.

16. The High Court of Justice shall be a Superior Court of Record, and, subject as in this Act mentioned, there shall be transferred to and vested in the said High Court of Justice the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any of the Courts following (that is to say):—

(1.) The High Court of Chancery, as a Common Law Court as well as a Court of Equity, including the jurisdiction of the Master of the Rolls, as a Judge or Master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a Common Law Court;
(2.) The Court of Queen's Bench;
(3.) The Court of Common Pleas at Westminster;
(4.) The Court of Exchequer, as a Court of Revenue, as well as a Common Law Court;
(5.) The High Court of Admiralty;
(6.) The Court of Probate;
(7.) The Court for Divorce and Matrimonial Causes;
(8). *The London Court of Bankruptcy;*
(9.) The Court of Common Pleas at Lancaster;
(10.) The Court of Pleas at Durham;
(11.) The Courts created by Commissions of Assize, of Oyer and Terminer, and of Gaol Delivery, or any of such Commissions;

The jurisdiction by this Act transferred to the High Court of Justice shall include (subject to the exceptions hereinafter contained) the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any one or more of the Judges of the said Courts, respectively, sitting in Court or Chambers, or elsewhere, when acting as Judges or a Judge, in pursuance of any statute, law, or custom, and all powers given to any such Court, or to any such Judges or Judge, by any statute; and also all ministerial powers, duties, and authorities, incident to any and every part of the jurisdiction so transferred.

So much of this section as relates to the London Court of

Act 1873, ss. 16, 17.

Bankruptcy is repealed by the Act of 1875. See note to s. 3, *ante*, p. 2.

The jurisdiction of the Master of the Rolls over the Register of Patent Proprietors, conferred by the 15 & 16 Vict. c. 83, s. 3, is vested by sub-s. 1, in the High Court: *Re Morgan's Patent*, 24 W. R. 245, M. R.

The Court of the Chancellor of the County Palatine of Lancaster is not interfered with by the Act: see *Re Alison's Trusts*, 8 Ch. D. 1 C. A. and *Re Longdendale Cotton Spinning Co.*, 8 Ch. D. 150, M. R. See also s. 95, *post*, p. 91, and note thereto. But appeals from that Court will go to the Court of Appeal under s. 18, sub-s. 2, *post*, p. 12.

The whole of the jurisdiction of the Courts enumerated is transferred by this section to the High Court of Justice. See the effect of this consolidation of powers commented on by Jessel, M. R., *Salt* v. *Cooper*, 16 Ch. D. at 549. But the procedure provided by the rules of Court, *post*, p. 175, is not of such wide application. The practice of the Divorce Court remains unchanged: s. 70, *post*, p. 73; s. 18 of the Act of 1875, *post*, p. 111; O. LXII., *post*, p. 443; so do criminal proceedings: s. 71, *post*, p. 73; s. 19 of the Act of 1875, *post*, p. 111; O. LXII., *post*, p. 443; and so, with certain specified exceptions, do proceedings on the Crown side of the Queen's Bench and Revenue proceedings: O. LXII., *ubi supra*.

By virtue of this section, the Probate Division has the same power to restrain any dealing with a ship or share in a ship as the Court of Chancery had under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 65: *Nicholas* v. *Dracachis*, 1 P. D. 72; and the Judge of the Divorce Court can grant an injunction under s. 24, sub-s. 8: *Noakes* v. *Noakes and Hill*, 4 P. D. 60; or attach a debt to enforce payment of costs: *Whitaker* v. *Whitaker*, 7 P. D. 15: see also *Marshall* v. *Marshall*, 5 P. D. 19. So too in an action by a husband in the Chancery Division to enforce a separation deed, a counter-claim by the wife for a judicial separation was allowed to be set up: *Besant* v. *Wood*, 12 Ch. D. 605, M. R. A Judge of the Chancery Division can by order compel the attendance of a witness before an arbitrator under the power given by s. 4 of the 3 & 4 Will. 4, c. 42: *Clarbrough* v. *Toothill*, 17 Ch. D. 707, M. R. So too he has power to grant probate of a will, but on grounds of convenience the jurisdiction will not be exercised: *Pinney* v. *Hunt*, 6 Ch. D. 98, M. R.: see too *Re Ivory*, 10 Ch. D. at 375, per Lush, J. As to the power of the Queen's Bench Division to deal with the rectification of deeds, see *Mostyn* v. *West Mostyn Coal Co.*, 1 C. P. D. 145; *Breslauer* v. *Barwick*, 36 L. T. 52; *Story* v. *Waddle*, 4 Q. B. D., 289, C. A.; or with the custody of infants, see *Re Goldsworthy*, 2 Q. B. D. 75.

In spite of this section it seems very uncertain whether a prerogative writ of mandamus can issue otherwise than from the Queen's Bench Division, see *Glossop* v. *Heston Local Board*, 12 Ch. D. at 115, 122, C. A. See also the note to s. 24, sub-s. 5, *post*, p. 22, and O. LXII., *post*, pp. 443, 444.

Sect. 17. Jurisdiction not transferred to High Court.

17. There shall not be transferred to or vested in the said High Court of Justice, by virtue of this Act—

(1.) Any appellate jurisdiction of the Court of Appeal in Chancery, or of the same Court sitting as a Court of Appeal in Bankruptcy:

(2.) Any jurisdiction of the Court of Appeal in Chancery of the County Palatine of Lancaster: Act 1873, s. 17.

(3.) Any jurisdiction usually vested in the Lord Chancellor or in the Lords Justices of Appeal in Chancery, or either of them, in relation to the custody of the persons and estates of idiots, lunatics, and persons of unsound mind:

(4.) Any jurisdiction vested in the Lord Chancellor in relation to grants of Letters Patent, or the issue of commissions or other writings, to be passed under the Great Seal of the United Kingdom:

(5.) Any jurisdiction exercised by the Lord Chancellor in right of or on behalf of Her Majesty as visitor of any college, or of any charitable or other foundation:

(6.) Any jurisdiction of the Master of the Rolls in relation to records in London or elsewhere in England.

Jurisdiction of Lords Justices in respect of lunatics.

By s. 7 of the Act of 1875, *post*, p. 99, it is enacted that "any jurisdiction usually vested in the Lords Justices of Appeal in Chancery, or either of them, in relation to the persons and estates of idiots, lunatics, and persons of unsound mind, shall be exercised by such Judge or Judges of the High Court of Justice or Court of Appeal as may be intrusted by the sign manual of Her Majesty or Her successors with the care and commitment of the custody of such persons and estates: and all enactments referring to the Lords Justices as so intrusted shall be construed as if such Judge or Judges so intrusted had been named therein instead of such Lords Justices: Provided, that each of the persons who may at the commencement of the principal Act be Lords Justices of Appeal in Chancery shall, during such time as he continues to be a Judge of the Court of Appeal, and is intrusted as aforesaid, retain the jurisdiction vested in him in relation to such persons and estates as aforesaid."

As to the jurisdiction of the Lords Justices in Lunacy, see before the Acts, 16 & 17 Vict. c. 70, s. 100. As to the jurisdiction of the Court of Chancery formerly, and now of the High Court of Justice, in respect to the guardianship and maintenance of persons of unsound mind not so found, see *Vane* v. *Vane*, 2 Ch. D. 124, M. R.

The special jurisdiction of the Master of the Rolls under sub-s. 6 is apparently preserved by s. 2 of the Act of 1881, *post*, p. 163, which makes him a Judge of the Court of Appeal only.

The Master of the Rolls by virtue of sub-s. 6 may direct the amendment of a clerical error in a specification filed in the Patent Office: *Re Johnson's Patent*, 5 Ch. D. 503. As to the register of Patent Proprietors, see *Re Morgan's Patent*, 24 W. R. 245.

Inasmuch as a re-hearing is in the nature of an appeal, the old power of the Court of Chancery to re-hear a case is taken away, and this part of its jurisdiction is vested in the Court of Appeal: *Re St. Nazaire Co.*, 12 Ch. D. 88, C. A.

Act 1873, s. 18.

Sect. 18. Jurisdiction transferred to Court of Appeal.

18. The Court of Appeal established by this Act shall be a Superior Court of Record, and there shall be transferred to and vested in such Court all jurisdiction and powers of the Courts following (that is to say):—

(1.) All jurisdiction and powers of the Lord Chancellor and of the Court of Appeal in Chancery, in the exercise of his and its appellate jurisdiction, and of the same Court as a Court of Appeal in Bankruptcy:

(2.) All jurisdiction and powers of the Court of Appeal in Chancery of the County palatine of Lancaster, and all jurisdiction and powers of the Chancellor of the duchy and county palatine of Lancaster when sitting alone or apart from the Lords Justices of Appeal in Chancery as a Judge of rehearing or appeal from decrees or orders of the Court of Chancery of the county palatine of Lancaster:

See *Re Longdendale Cotton Spinning Co.*, 8 Ch. D. 150, M. R., and *Lee* v. *Nuttall*, 12 Ch. D. 61, C. A.

(3.) All jurisdiction and powers of the Court of the Lord Warden of the Stannaries assisted by his assessors, including all jurisdiction and powers of the said Lord Warden when sitting in his capacity of Judge:

(4.) All jurisdiction and powers of the Court of Exchequer Chamber:

(5.) All jurisdiction vested in or capable of being exercised by Her Majesty in Council, or the Judicial Committee of Her Majesty's Privy Council, upon appeal from any judgment or order of the High Court of Admiralty, or from any order in lunacy made by the Lord Chancellor, or any other person having jurisdiction in lunacy.

The Court of Appeal has no power to hear an original petition; its jurisdiction is exclusively appellate: *Re Dunraven Adare Coal and Iron Co.*, 33 L. T. 371; 24 W. R. 37, C. A.: nor has it power to vacate the enrolment of a decree of the Court of Chancery enrolled before the Act: *Allan* v. *Electric Telegraph Co.* 24 W. R. 898, C. A. Enrolment has no effect in preventing an appeal, and is now a useless ceremony: *Hastie* v. *Hastie*, 2 Ch. D. 304, C. A. An appeal from a judgment of the Lord Mayor's Court upon demurrer lies to the Court of Appeal, not to the Divisional Court under s. 45, *post*, p. 55: *Le Blanch* v. *Reuter's Telegraph Co.*, 1 Ex. D. 408, C. A. But in ordinary appeals from the Mayor's Court where error on the record is not alleged, the appeal lies to a Divisional

Court, and is governed by s. 45 : *Appleford* v. *Judkins*, 3 C. P. D. 489, C. A. **Act 1873, ss. 18, 19.**

The Court of Appeal has, it seems, no power to re-hear an appeal from the High Court, *Flower* v. *Lloyd*, 6 Ch. D. 297, C. A., and it is doubtful whether it has any power to re-hear a bankruptcy appeal: *Re Hooper*, 14 Ch. D. 1, C. A.

As to the jurisdiction of the Lords Justices in Lunacy, see note to s. 17, *ante*, p. 11.

By O. LXII. r. 2 the provisions of O. LVIII. as to appeals are applied to civil proceedings on the Crown side of the Queen's Bench Division, and to revenue proceedings, though these proceedings are for the most part exempted from the operation of the rules of Court.

The jurisdiction of the full Court of Divorce, as established under the Divorce Acts, was not transferred to the Court of Appeal by this section : *Westhead* v. *Westhead*, 2 P. D. 1 ; *Gladstone* v. *Gladstone*, *Ibid.* 143 ; but the omission is now remedied by s. 9 of the Act of 1881, *post*, p. 165:

See further the note to the next section.

Sect. 19.

Appeals from High Court.

19. The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice, or of any judges or judge thereof, subject to the provisions of this Act, and to such Rules and Orders of Court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this Act.

Powers of Court of Appeal

For all the purposes of and incidental to the hearing and determination of any appeal within its jurisdiction, and the amendment, execution, and enforcement of any judgment or order made on any such appeal, and for the purpose of every other authority expressly given to the Court of Appeal by this Act, the said Court of Appeal shall have all the power, authority, and jurisdiction by this Act vested in the High Court of Justice.

This section deals with two distinct questions ; first, it defines in what cases an appeal is to lie from the High Court or the Judges thereof to the Court of Appeal; secondly, it specifies the powers of the Court of Appeal in dealing with such appeals. As to the latter point, see note to O. LVIII., r. 5, *post*, p. 422.

By s. 100, *post*, p. 93, "Order" shall include rule, and "Judgment" shall include decree.

The 19th section gives a general right of appeal from every order or judgment of the High Court or any judge thereof. Its operation is, however, limited in two directions, namely (*a*), by Rules of Court, which create Divisional Courts and interpose an appeal thereto between the original court and the Court of Appeal ; and (*b*) by subsequent sections of this and other Acts which restrict the right of appeal in particular cases.

Divisional Courts.

1. As to Divisional Courts see O. LVII. A, *post*, p. 415, and notes thereto ; also O. XXXIX. as to motions for new trials. Where a

Act 1873, s. 19.

party appealed from the order of a judge at Chambers to a Divisional Court, and failed to prosecute his appeal there, the Court of Appeal declined to entertain an appeal from the order of the Divisional Court, dismissing his appeal. *Walker* v. *Budden*, 5 Q. B. D. 267, C. A. An appeal lies direct to the Court of Appeal, and not to a Divisional Court from the order of a judge at nisi prius referring the issues in an action to an official referee. *Hoch* v. *Boor*, 49 L. J., C. P. D., 665, C. A.

Restrictions on Appeals.

2. As regards the statutory restrictions on the general right of appeal.

By s. 45, *post*, p. 55, the judgment of a Divisional Court upon an appeal from an inferior Court is to be final, unless special leave to appeal be given.

By s. 47, *post*, p. 58, the judgment of the Court for Crown Cases Reserved is final; and no appeal lies to the Court of Appeal in criminal matters save for error on the record.

By s. 49, *post*, p. 60, no appeal lies, except by leave, from any order made by consent, or as to costs only which by law are left to the discretion of the Court.

By s. 50, *post*, p. 61, an appeal does not, without leave, lie direct to the Court of Appeal from an order made at Chambers. See, too, O. LVII. A, r. 1, *post*, p. 61.

By s. 20 of the Act of 1876, *post*, p. 138, no appeal lies where by statute it is provided that the decision of a court or judge is to be final.

By s. 9 of the Act of 1881, *post*, p. 165, such appeals as might have been brought under the Divorce Acts to the Full Court of Divorce may now be brought to the Court of Appeal; and by s. 10 of the same Act a limitation is placed on appeals from orders absolute for dissolution or nullity of marriage, where an appeal might have been brought from the order *nisi*.

By s. 14 of the Act of 1881, *post*, p. 167, the decision of the High Court on questions of law in registration and parliamentary and municipal election cases is made final unless special leave to appeal to the Court of Appeal is given.

General right of appeal.

By virtue of the 19th section an appeal lies from an order of the Queen's Bench Division discharging a rule *nisi* for quashing an order of Quarter Sessions as to the validity of a rate. *Overseers of Walsall* v. *London and North Western Railway*, 4 App. Cas. 30 H. L.; and where a special case is stated for the opinion of the Queen's Bench Division, its jurisdiction is judicial, not merely consultative, and its decision on the case is a "judgment or order" within the meaning of the section, *ibid.* See also *Reg.* v. *Swindon Local Board*, 49 L. J., Q. B. D. 522, C. A., commenting on the last case, and *Reg.* v. *Savin*, 6 Q. B. D. 309, C. A. So too an appeal lies from the decision of a Divisional Court upon a special case stated by an umpire under the Lands Clauses Act, 1845. *Bidder* v. *North Staffordshire Railway Co.*, 4 Q. B. D. 412, C. A.; or upon a special case stated by an arbitrator pursuant to the Common Law Procedure Act, 1854, *ibid.* at 425, see *e.g.*, *Mirabita* v. *Imperial Ottoman Bank*, 3 Ex. D. 164, C. A.; *Collins* v. *Vestry of Paddington*, 5 Q. B. D. 368, C. A. By s. 59 of the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), it is expressly provided that an appeal shall lie to the Court of Appeal from the decision of the High Court or any judge thereof upon any case stated under the provisions of that Act, and from the Court of Appeal to the House of Lords. An appeal lies from an order of the Queen's Bench

Division discharging a rule for a certiorari to remove into that Court an order of petty sessions for the maintenance of a pauper lunatic: *The Queen* v. *Pemberton*, 5 Q. B. D. 95, C. A.; and from the order of a Divisional Court directing a writ of prohibition to issue to a County Court judge: *Barton* v. *Titchmarsh*, 49 L. J., Ex. 573; and from the order of a Divisional Court discharging a rule for an order on a County Court judge to hear an action: *Morgan* v. *Rees*, 6 Q. B. D. 508, C. A.; and before the Judicature Act of 1881 it was held that an appeal lay from an interlocutory order of a Divisional Court relating to a Municipal Election Petition: *Harmon* v. *Park*, 6 C. P. D. 323, C. A.; but see now s. 14 of that Act, *post*, p. 167 and note thereto. **Act 1873, s. 19.**

The effect of this section, read with ss. 17, 18, *supra*, is to take away the old power of the Court of Chancery to re-hear its decrees. The jurisdiction to re-hear an order of the High Court is now vested in the Court of Appeal: *Re St. Nazaire Co.*, 12 Ch. D. 88, C. A. In a probate case where the judge tried the issues of fact without a jury and then gave judgment on his findings, it was held that an appeal lay from his judgment to the Court of Appeal, but the Court at the same time expressed an opinion that the party decided against might have applied to the Court below for a re-hearing under rule 60 of the old Probate Rules: *Sugden* v. *Lord St. Leonards*, 1 P. D. 154, C. A. Having regard to *Re St. Nazaire Co.*, cited above, it is very doubtful how far this expression of opinion could now be sustained. As to re-hearing an appeal by the Court of Appeal, see note to last section, *ante*, p. 13; see also *post*, p. 422. A judge, however, can always reconsider his decision until the order has been drawn up: *Re St. Nazaire Co.*, 12 Ch. D. at p. 91, per Jessel, M. R. See for an example *Miller's Case*, 3 Ch. D. 661, M. R., and see passim *Att.-General* v. *Tomline*, 7 Ch. D. 338; *Re Schroeder*, 12 Ch. D. 667, M. R. See also O. XLI. A., *post*, p. 362, which gives power to correct accidental slips or errors in judgments. Re-hearing by High Court.

Where an order of reference, made before the Act, provided that neither party should bring error, and the arbitrator stated his award in the form of a special case for the Queen's Bench Division, it was held that no appeal lay from the judgment of the Queen's Bench Division thereon: *Jones* v. *Victoria Graving Dock Co.*, 2 Q. B. D. 314, C. A. The undertaking not to appeal must be a formal one. In *Re Hull and County Bank*, 13 Ch. D. 261, C. A., a claim in a winding-up proceeding was disallowed. On an intimation from the counsel for the claimant that he did not intend to appeal, costs were not asked for. The order dismissing the claim without costs, when drawn up, contained no reference to any undertaking not to appeal. Subsequently an appeal was brought, and the Court of Appeal held that they could not refuse to entertain it, as no undertaking not to appeal was embodied in the order. Undertaking not to appeal.

An appeal lies from the judgment of a judge upon fact as well as upon law; *The Glennibanta*, 1 P. D. 283, C. A.; *Sugden* v. *Lord St. Leonards*, 1 P. D. 154, C. A.; *Bigsby* v. *Dickinson*, 4 Ch. D. 24, C. A.: see too *Jones* v. *Hough*, 5 Ex. D. 115 C. A. But when the evidence has been taken viva voce, the Court of Appeal gives great weight to the consideration that the judge in the Court below has seen the demeanour of the witness, and is loth to over-rule Questions of fact.

Act 1873, ss. 19, 20.

him: *Bigsby* v. *Dickinson, ubi supra*; *The Milanese*, 43 L. T. 107, C. A. As to the time for appealing from the judgment of a judge on a question of fact, see *Dollman* v. *Jones*, 12 Ch. D. 553, C. A.

Discretionary orders.

An appeal lies from discretionary orders, but the Court of Appeal do not, as a general rule, interfere with the exercise of a discretion which they do not approve unless it appears that the discretion was exercised on a wrong principle. See *e. g.* orders allowing or disallowing pleadings; *Golding* v. *Wharton Salt Works Co.*, 1 Q. B. D. 374, C. A.; *Watson* v. *Rodwell*, 3 Ch. D. 380, C. A., see per Mellish, L. J., at 383, as to the principle: *Huggons* v. *Tweed*, 10 Ch. D. 359, C. A. See also *Byrd* v. *Mann*, 7 Ch. D., at 286, 287, C. A., as to leave to amend at trial. As to directions as to mode of trial, see *Swindell* v. *Birmingham Syndicate*, 3 Ch. D. 127, C. A. As to leave to defend under O. XIV., see *Papayanni* v. *Coutpas*, W. N. 1880; also *Wallingford Mutual Society*, 5 App. Cas. 685, H. L., p. 109. See too note to s. 49, *post*, p. 60. As to damages, see *Webster* v. *British Empire Assurance Co.*, 15 Ch. D., at 180, per Thesiger, L. J. As to disallowing interrogatories, see *Fisher* v. *Owen*, 8 Ch. D. at p. 653, C. A. As to an order refusing to commit for contempt, see *Jarmain* v. *Chatterton*, 30 W. R. 461, C. A. Where by the express terms of a statute an absolute discretion is given, it seems that no appeal lies: *The Amstel*, 2 P. D. 186, C. A.

Prerogative mandamus.

The importance of the return to writs of mandamus and of the subsequent proceedings thereon is much diminished by this section. An appeal now lies from the order directing the writ to issue; so unless there be facts in dispute, any question of law can be raised and appealed without the embarrassment or delay of pleadings. In *Julius* v. *Bishop of Oxford*, 5 App. Cas. 214 (H. L.), the Queen's Bench Division ordered that a mandamus should issue to the bishop commanding him to take proceedings under the Church Discipline Act against a clerk. An appeal against this order was brought to the Court of Appeal, and the case was ultimately taken to the House of Lords. The clerk also was allowed to join in the appeal, although the mandamus was of course directed to the bishop alone. See, too, *The Queen* v. *Holl*, 7 Q. B. D. 575, C. A.

Person not party below

Where a person is affected by an order of the High Court, but is not a party to the proceedings, he may still obtain leave to appeal if he could have done so before the Judicature Acts: *Re Markham*, 16 Ch. D. 1, C. A., but not otherwise: *Watson* v. *Cave*, 17 Ch. D. 19, C. A. See, too, *Re Clagget*, 30 W. R. 374, C. A.; *Ex parte Tucker*, 12 Ch. D. 308, C. A. As to the test, see *Crawcour* v. *Salter*, 30 W. R. 328, C. A.

As to the practice on appeals see O. LVIII., *post*, p. 417. As to moving for a new trial in the Court of Appeal where a case has been tried by a judge without a jury, see O. XXXIX., r. 1, *post*, p. 350, and O. XL., rr. 4a, 10, *post*, pp. 356, 359.

Sect. 20.

20. [*No appeal from High Court or Court of Appeal to House of Lords or Judicial Committee.*]

By s. 2 of the Act of 1875, *post*, p. 95, the operation of this section, as well as of ss. 21 and 55, was postponed to the 1st Nov., 1876; and by s. 24 of the Act of 1876, *post*, p. 140, the three sections are repealed. As to appeals to the House of Lords, see the last-mentioned Act, *post*, p. 178; and for procedure on such appeals, see Forms and Orders, *post*, p. 673.

Act 1873, s. 22.

21. [*Power to transfer jurisdiction of Judicial Committee by Order in Council.*] Sect. 21.

See note to last section.

22. From and after the commencement of this Act the several jurisdictions which by this Act are transferred to and vested in the said High Court of Justice and the said Court of Appeal respectively shall cease to be exercised, except by the said High Court of Justice and the said Court of Appeal respectively, as provided by this Act; and no further or other appointment of any judge to any Court whose jurisdiction is so transferred shall be made except as provided by this Act: Provided, that in all causes, matters, and proceedings whatsoever which shall have been fully heard, and in which judgment shall not have been given, or having been given shall not have been signed, drawn up, passed, entered, or otherwise perfected at the time appointed for the commencement of this Act, such judgment, decree, rule, or order may be given or made, signed, drawn up, passed, entered, or perfected respectively, after the commencement of this Act, in the name of the same Court, and by the same judges and officers, and generally in the same manner, in all respects as if this Act had not passed; and the same shall take effect, to all intents and purposes, as if the same had been duly perfected before the commencement of this Act; and every judgment, decree, rule, or order of any Court whose jurisdiction is hereby transferred to the said High Court of Justice or the said Court of Appeal, which shall have been duly perfected at any time before the commencement of this Act, may be executed, enforced, and, if necessary, amended or discharged by the said High Court of Justice and the said Court of Appeal respectively, in the same manner as if it had been a judgment, decree, rule, or order of the said High Court or of the said Court of Appeal; and all causes, matters, and proceedings whatsoever, whether civil or criminal, which shall be pending in any of the Courts whose jurisdiction is so transferred as aforesaid at the commencement of this Act, shall be continued and concluded as follows (that is to say), in the case of proceedings in error or on appeal, or of proceedings before the Court Sect. 22. Transfer of pending business.

Act 1873, ss. 22—24, (1.)

of Appeal in Chancery, in and before Her Majesty's Court of Appeal; and, as to all other proceedings, in and before Her Majesty's High Court of Justice. The said Courts respectively shall have the same jurisdiction in relation to all such causes, matters, and proceedings as if the same had been commenced in the said High Court of Justice, and continued therein (or in the said Court of Appeal, as the case may be) down to the point at which the transfer takes place; and, so far as relates to the form and manner of procedure, such causes, matters, and proceedings, or any of them, may be continued and concluded, in and before the said Courts respectively, either in the same or the like manner as they would have been continued and concluded in the respective Courts from which they shall have been transferred as aforesaid, or according to the ordinary course of the said High Court of Justice and the said Court of Appeal respectively (so far as the same may be applicable thereto), as the said Courts respectively may think fit to direct.

Sect. 23. Rules as to exercise of jurisdiction.

23. The jurisdiction by this Act transferred to the said High Court of Justice and the said Court of Appeal respectively shall be exercised (so far as regards procedure and practice) in the manner provided by this Act, or by such Rules and Orders of Court as may be made pursuant to this Act; and where no special provision is contained in this Act or in any such Rules or Orders of Court with reference thereto, it shall be exercised as nearly as may be in the same manner as the same might have been exercised by the respective Courts from which such jurisdiction shall have been transferred, or by any of such Courts.

As to the power of making Rules and the purposes for which they may be made, see s. 17 of the Act of 1875, *post*, p. 109; and s. 17 of the Act of 1876, *post*, p. 136.

For the Rules now made, see Schedule I. to the Act of 1875, *post*, p. 175; and the later rules there incorporated with it.

Sect. 24. Law and equity to be concurrently administered.

24. In every civil cause or matter commenced in the High Court of Justice law and equity shall be administered by the High Court of Justice and the Court of Appeal respectively according to the Rules following:

(1.) If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim whatsoever asserted by any defendant or

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respondent in such cause or matter, or to any relief founded upon a legal right, which heretofore could only have been given by a Court of Equity, the said Courts respectively, and every Judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose properly instituted before the passing of this Act. Act 1873, s. 24, (1), (2).

This and the next section undertake to deal with the long-standing anomaly, to which so many palliations had from time to time been applied, but which had never been removed—by which different Courts recognised different rights and duties, applied different remedies to the same case, and in some cases even enforced rules of law actually in conflict with one another. The removal of the last-mentioned defect, actual conflict of law, is provided for by s. 25. The rest of the matter is dealt with in the present section.

Summary.

The provisions of this section may be shortly summarized thus :—

The plaintiff may assert an equitable claim in any Court (*sub-s.* 1).

The plaintiff may obtain an equitable remedy in any Court (*ibid.*).

The defendant may raise any equitable answer or defence in any Court ; that is to say, anything which would hitherto have been good by way of answer if the suit had been brought in Chancery (*sub-s.* 2), or would have afforded ground for an injunction if the action had been brought at law (*sub-s.* 5).

The defendant may assert, by way of counter claim against the plaintiff, any claim, legal or equitable, which he might have raised by a cross suit at law or in equity (*sub-s.* 3).

The defendant may obtain relief relating to or connected with the original subject of the action against other persons, whether already parties or not (*ibid.*). As to the extent to which such relief may be obtained, see note to sub-s. 3, *post*, p. 21, and O. XVI., rr. 17, *et seq.*, *post*, p. 237, and note thereto ; and O. XIX., r. 3, *post*, p. 249, and note thereto.

All Courts are to recognise equitable rights incidentally appearing (*sub-s.* 4).

No cause is to be restrained by injunction ; but what would have been ground for injunction is to be raised by way of defence, or upon an application to stay proceedings (*sub-s.* 5) ; or, if more convenient, the action may be transferred to another Division (*post*, pp. 388, *et seq.*).

Subject to these provisions, common law rights and duties are to be recognised (*sub-s.* 6).

Every Court is to apply all appropriate remedies, and dispose of all matters in controversy (*sub-s.* 7).

For definitions of "plaintiff," "petitioner," "defendant," see s. 100, *post*, p. 93. The words "or respondent" are omitted in sub-ss. 2 and 3 ; but see s. 100, voc. "defendant."

Equitable defences.

(2.) If any defendant claims to be entitled to any

Act 1873, s. 24, (2), (3).

equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said Courts respectively, and every Judge thereof, shall give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that Court for the same or the like purpose before the passing of this Act.

Where a defence shows grounds entitling the defendant in equity to be relieved against a contract sought to be enforced by the plaintiff, any Division in which the action is pending may give effect to the equitable defence, at least so far as to treat it as a defence to the action: *Mostyn* v. *West Mostyn Coal Co.*, 1 C. P. D. 145. Or if the action be in a Division other than the Chancery, the Court may order it to be transferred to the Chancery Division. See O. LI., *post*, p. 393, and notes thereto. See also *Eyre* v. *Hughes*, 2 Ch. D. 148, V.-C. B.; *Hughes* v. *Metropolitan Ry. Co.*, 1 C. P. D. 120, 131 C. A.; and *Marshall* v. *Marshall*, 5 P. D. 19, where in a suit for restitution of conjugal rights effect was given to an equitable defence that the wife was bound by a covenant in the deed of separation not to sue for restitution.

Counter-claims and third parties.

(3.) The said Courts respectively, and every Judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any Judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such

claim pursuant to any Rule of Court or any Order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant. Act 1873, s. 24, (3), (4).

The words of this sub-section, it will be observed, are very wide with respect to the claims which may be raised against a third person, other than the plaintiff. But the third person must be "served with notice in writing of such claim pursuant to any Rule of Court or any Order of the Court." And the Rules of the Supreme Court have not provided for the operation of the sub-section except within narrow limits. The result of the Rules and the decisions interpreting them is, that:—First, a counter claim may be made against the plaintiff, or the plaintiff and another person; but no claim to any relief in which the plaintiff is not interested can be raised against a third person by way of counter-claim: *Treleaven* v. *Bray*, 45 L. J. Ch. 113, C. A. As to what may be raised by way of counter-claim, see further, note to O. XIX., r. 3, *post*, p. 249, and O. XXII. r. 9, *post*, p. 269. Secondly, under O. XVI., rr. 17, *et seq.*, *post*, p. 237, the defendant may bring a third party into the action if he claims contribution, indemnity, or other remedy or relief over against him, or can show that, on any ground, a question in the action should be decided as between himself and such third person. In that case, he cannot obtain any present relief against the third person; but only a decision of the question in the action, which will be binding as between him and the third person in any subsequent action in which relief is sought: *Treleaven* v. *Bray*, *ubi supra*; and see note to O. XVI., r. 17, *post*, p. 237.

As to the practice in the case of a counter-claim, see O. XIX., r. 3, *post*, p. 249, and notes thereto; O. XXII., r. 10, *post*, p. 270.

(4.) The said Courts respectively, and every Judge thereof, shall recognise and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognised and taken notice of the same in any suit or proceeding duly instituted therein before the passing of this Act. Equities appearing incidentally.

See *Williams* v. *Snowdon*, W. N. 1880, 124, where the Court gave effect to a right to specific performance of an undertaking to grant a lease which appeared incidentally, and was not claimed by the defendant in a counter-claim. Where it appears inciden-

Act 1873, s. 24, (4), (5).

tally in a cause or matter that a party to it is entitled to have a deed rectified or set aside, the Court for the purposes of the cause or matter, will treat the deed as rectified or set aside, though such relief was not expressly claimed by the party: *Mostyn* v. *The West Mostyn Coal and Iron Co.*, 1 C. P. D. 145.

Com-promise.

As to enforcing an agreement not to appeal, see *Jones* v. *Victoria Graving Dock Co.*, 2 Q. B. D. 314, C. A.: *Re Hull and County Bank*, 13 Ch. D. 261, C. A. As to enforcing a compromise, see *Eden* v. *Naish*, 7 Ch. D. 781; *Scally* v. *Lord Dundonald*, 8 Ch. D. 658, C. A.; *Re Gaudet Frères Steamship Co.*, 12 Ch. D. 882; *Davis* v. *Davis*, 13 Ch. D. 861.

Defence or stay instead of injunction or prohibition.

(5.) No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: Provided always, that nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule, or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such order as shall be just.

The question of restraining or staying proceedings may be considered under four different heads, namely, 1. the power of the High Court to restrain proceedings in other Courts; 2. the powers of other Courts to restrain proceedings in the High Court; 3. the power of one Division of the High Court to stay or restrain proceedings in another; 4. the powers of the Division or Court before which an action or proceeding is pending to stay such action or proceeding.

Power of High Court to restrain proceedings in other Courts.

1. This sub-section clearly does not affect the power of the High Court to restrain proceedings before other tribunals. Thus, when an ecclesiastical, or other inferior Court, has exceeded its

jurisdiction, prohibition will issue as heretofore, even though an appeal lies to the Privy Council: *Martin* v. *Mackonochie*, 4 Q. B. D. at 755, C. A.; 4 App. Cas. 424; and when prohibition would lie, the same end can now, in certain cases, be obtained by injunction: *Hedley* v. *Bates*, 13 Ch. D. 498, M. R. So too the High Court can restrain an unfit person by injunction from acting as arbitrator: *Beddow* v. *Beddow*, 9 Ch. D. 89, M. R. As to restraining a party from proceeding before a foreign tribunal, see *Portarlington* v. *Soulby*, 3 My. & K. 104; *Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681, M. R. **Act 1873, s. 24, (5).**

2. As regards the power of other Courts to restrain proceedings in the High Court, it has been held that this sub-section does not affect the jurisdiction of the Court of Bankruptcy to restrain an action in the High Court: *Ex parte Ditton*, 1 Ch. D. 557, C. A.; and that this jurisdiction may be exercised by a County Court in bankruptcy proceedings: *Snow* v. *Sherwell*, 25 W. R. 433, C. A. But the Chancery Court of Lancaster has no power to restrain or stay proceedings in the High Court: *Re Alison's Trusts*, 8 Ch. D. 1 C. A.; nor can a County Court in which an administration suit is pending stay proceedings in the High Court in respect of claims proveable in that suit: *Cobbold* v. *Pryke*, 4 Ex. D. 315. **Power of other courts to restrain proceedings in High Court.**

3. The main object of the sub-section is that one Division of the High Court shall not interfere with another, but that the Court before which an action is pending should deal completely and finally with the whole matter in controversy between the parties. See *Garbutt* v. *Faweus*, 1 Ch. D. 155, C. A. As to dealing completely with the whole subject, see *Salt* v. *Cooper*, 16 Ch. D. 544, C. A. Thus a Judge of the Chancery Division cannot restrain a sheriff from dealing with goods taken in execution under a *fi. fa.* to enforce a judgment of the Common Pleas Division: *Wright* v. *Redgrave*, 11 Ch. D. 24, C. A.; nor can he restrain proceedings to enforce an award in an action pending in another Division: *Powell* v. *Jessbury*, 9 Ch. D. at 39, C. A. See too *Crowle* v. *Russell*, 4 C. P. D. 186, C. A., when an order to stay an action by the mortgagee against the tenants of the mortgaged property pending an action to administer the estate of the mortgagor was discharged. It has, however, been held that a Judge in the Chancery Division may enforce specific performance of an agreement for a separation deed and for the compromise of a suit in the Divorce Court: *Hart* v. *Hart*, 18 Ch. D. 670. In the case of winding-up proceedings a difference of opinion arose. There was no doubt that a Judge of any Division before whom any action against the Company was pending might stay the action: *Walker* v. *Banagher Distilleries Co.*, 1 Q. B. D. 129; but the doubt was whether the Chancery Division Judge before whom the winding up was proceeding had not also the power under s. 85 of the Companies Act, 1862, to stay all actions. See *Kingchurch* v. *People's Garden Co.*, 1 C. P. D. 45; but it is now settled that he cannot, and that before the winding-up order has been made application to stay must be made where the action is pending: *Re People's Garden Co.*, 1 Ch. D. 44, M. R.; *Re Morriston Patent Fuel Co.*, W. N. 1877, 20, M. R.; *Re Artistic Colour Printing Co.*, 14 Ch. D. 502, M. R.; *South of France Pottery Works*, 25 W. R. 870, 37 L. T. 260, C. A. The difficulty, after a winding-up or administration order has been made, is now removed by O. LI. r. 2A (R. S. C. June, 1876) *post*, p. 392, which enables the Judge before whom the winding up or administration is pending to transfer the action to himself, and thus get complete control over it. **Different divisions of High Court.**

It seems, however, that the prerogative of the Crown is not affected

Act 1873, s. 24, (5), (6).

by this sub-section; therefore the Exchequer Division can still, on the application of the Attorney-General, restrain an action in the Chancery Division which involves questions affecting the revenue, and transfer the action to itself: *Attorney-General* v. *Constable*, 4 Ex. D. 172. See further as to the prerogative of the Crown and the application of the rule that the Crown is not bound by a statute unless expressly referred to therein: *Re Bonham*, 10 Ch. D. 595, C. A.

Again, though one Division or Court cannot in general stay pending proceedings in another, one Division or Court may still restrain the institution of proceedings in another: *Besant* v. *Wood*, 12 Ch. D. at 630. per Jessel, M. R.; *Cercle Restaurant Co.* v. *Lavery*, 18 Ch. D. 555, M. R.

Stay or defence in Court before which action is pending.

4. In a suit for restitution of conjugal rights the Court declined to stay proceedings on affidavits that the suit contravened the terms of a separation deed, but ordered the defence to be raised by plea, inasmuch as there was a substantial question for argument: *Marshall* v. *Marshall*, 5 P. D. 19. In an action in the Common Pleas Division to recover possession of certain mortgaged hereditaments, an order to stay the action pending the result of certain proceedings in the Chancery Division relating to the mortgaged hereditaments was set aside by the Court of Appeal; *Crowle* v. *Russell*, 4 C. P. D. 186, C. A. As to staying a cross action with leave to substitute a counter-claim, see *Adamson* v. *Moore*, 44 L. T. 420. *Thomson* v. *S. E. Ry.*, W. N. 1882, p. 52, C. A. As to the terms on which an action against a company which is voluntarily wound up will be stayed, see *Rose* v. *Garden Lodge Coal Co.*, 3 Q. B. D. 235. See too *Eccringham* v. *Co-operative Family Beer Co.*, W. N. 1880, 97, C. A. As to stay of proceedings to enforce a compromise or where proceedings are vexatious, see note to sub-section 4, *supra*, p. 22. As to test actions, see *post*, p. 394. As to stay of execution pending appeal, see *post*, p. 430. As to staying or dismissing a vexatious or frivolous action or proceeding, see *Darkins* v. *Prince Edward of Saxe-Weimar*, 1 Q. B. D. 499; *Ex parte Griffin*, 12 Ch. D. 480, C. A. As to a second action for relief claimed in a former action, see *Re Aird*, 26 W. R. 441, C. A.

Summary motion.

The sub-section authorizes the application for stay of proceedings to be made by "motion in a summary way." This does not mean that the motion is to be made *ex parte*, though in a case of urgency it may be so made and an interim stay ordered: *Blewitt* v. *Dowling*, W. N. 1875, p. 202; *Kevers* v. *Mitchell*, W. N. 1876, p. 53. In winding-up cases, however, under s. 85 of the Companies Act, 1862, the practice is to make the order absolute on an *ex parte* application: *Masbach* v. *James Anderson & Co.*, W. N. 1877, p. 252, 26 W. R. 100; *Eccringham* v. *Co-operative Family Beer Co.*, W. N. 1880, p. 99, C. A.

Common law and statutory rights and duties.

(6.) Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner aforesaid, and to the other express provisions of this Act, the said Courts respectively, and every Judge thereof, shall recognise and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities existing by the Common Law or by any custom, or created by any Statute, in the same manner as the same would

have been recognised and given effect to if this Act had not passed by any of the Courts whose jurisdiction is hereby transferred to the said High Court of Justice. Act 1873, ss. 24—25.

See *Kendall* v. *Hamilton*, 4 App. Cas. at p. 516, per Lord Cairns. Alterations in procedure effected by the Act must be distinguished from alterations in substantive law.

(7.) The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act, in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided. Determination of entire controversy.

Under this sub-section, when a plaintiff had obtained final judgment, and the sheriff had returned that there were no lands or goods which he could seize, it was held that the Court had power to grant equitable execution against the defendant by appointing a receiver in the action, although no claim for a receiver was indorsed on the writ, and that a fresh action was unnecessary. *Salt* v. *Cooper*, 16 Ch. D. 544, C. A.; *Smith* v. *Cowell*, 6 Q. B. D. 75, C. A. As to counter claims, see O. XIX., r. 3, *post*, p. 243, and note thereto. As to the general duty imposed by this sub-section to decide all matters in controversy, see *Tharp* v. *Macdonald*, 3 P. D. 76, at 81, 82; *Hedley* v. *Bates*, 13 Ch. D. at 501, M. R.; *Dowdeswell* v. *Dowdeswell*, 9 Ch. D. 294, C. A. See in illustration, *Re Gaudet Frères Steamship Co.*, 12 Ch. D. 882. The Court, however, may decline to decide questions relating to contingent interests which may never come into possession. *Kevan* v. *Crawford*, 6 Ch. D. 29 C. A. And where a will purports to be made under a power and the court has all persons interested before it, the court ought, having regard to this sub-section, not only to decide on the existence of the power, but also whether it is well executed. *Tharp* v. *Macdonald*, 3 P. D. 76, C. A.

Sect. 25.

25. And whereas it is expedient to take occasion of the union of the several Courts whose jurisdiction is hereby transferred to the said High Court of Justice to amend and declare the law to be hereafter administered in Rules of law upon certain points:

Act 1873, s. 25 (1)—(3).

England as to the matters next hereinafter mentioned: Be it enacted as follows:

The present section undertakes to render uniform the rules of law administered in the several divisions of the Court in the points as to which they were in conflict. The method which has been adopted is to deal in the first ten sub-sections with specific cases in which conflicting rules have hitherto existed, and to provide what rule is to prevail for the future. The rule adopted is in general that of the Court of Chancery. But in sub-s. 1 the Bankruptcy Rule, and in sub-s. 9 the Admiralty Rule, are adopted; and in sub-s. 8, one different in some respects from any hitherto in force. By sub-s. 11, it is enacted generally, that in cases not specifically provided for the equity rule is to prevail.

Administration of assets of insolvent estates.

(1.) *In the administration by the Court of the assets of any person who may die after the passing of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future or contingent liabilities, respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person may come in under the decree or order for the administration of such estate and make such claims against the same as they may respectively be entitled to by virtue of this Act.*

This sub-section is repealed by s. 10 of the Act of 1875, *post*, p. 102, which is substituted for it. It never came into operation, *Sherwin* v. *Selkirk*, 12 Ch. D. 68, C. A. The substituted section includes winding-up, which the repealed sub-section left untouched.

Statutes of Limitation inapplicable to express trusts.

(2.) No claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations.

See 3 & 4 Will. IV. c. 27, s. 25; *Petre* v. *Petre*, 1 Drew. 371, as to realty. This sub-section applies to personalty as well as realty, *Banner* v. *Berridge*, 18 Ch. D. 254.

Equitable waste.

(3.) An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste,

unless an intention to confer such right shall expressly appear by the instrument creating such estate. Act 1873, s. 25 (3)—(6).

(4.) There shall not, after the commencement of this Act, be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity. Merger.

See *Kingham* v. *Chambers*, 10 Ch. D. 743.

(5.) A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person. Suits for possession of land by mortgagors.

See *Fairclough* v. *Marshall*, 4 Ex. D. 37, C. A.

(6.) Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims Assignment of debts and choses in action.

Act 1873, s. 25 (6).

to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees.

Rights of assignee.

At common law a chose in action was not assignable, but in equity the assignment of a chose in action was considered as amounting to a declaration of trust and to an agreement to permit the assignee to use the name of the assignor in order to recover the debt or to reduce the property into possession. *Story Eq. Jur.* § 1040. If the assignee sued in equity he was obliged to make the assignor a party, either as defendant or more usually as co-plaintiff, *Daniell Ch. Pr.* 5, ed. 177, unless the thing assigned was a mere equitable right, in which case the assignee might sue alone, *ibid.* p. 185. If the assignee sued at law, he sued simply in the name of the assignor, but in that case he was bound to give, or at any rate to offer, the assignor a sufficient indemnity against costs: and where no Statute has interfered the old practice in this respect still remains unaltered. *Turquand* v. *Fearon*, 4 Q. B. D. 280.

By the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), the assignee of a life policy is enabled to sue on it in his own name. See *Curtius* v. *Caledonian Ins. Co.*, W. N. 1881, p. 164, C. A.

By the Policies of Marine Assurance Act, 1868 (31 & 32 Vict. c. 86), the assignee of a marine policy may sue on it in his own name. It has been held that a set-off against the assignor, is not a "defence" within the meaning of this Act, which can be set up by the debtor when sued by the assignee: *Pellas* v. *Neptune Marine Ins. Co.*, 5 C. P. D. 34, C. A.

By s. 27 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), the transferee of a statutory mortgage may apparently sue on it in his own name.

The present sub-section is a general enactment applying to all absolute assignments in writing, of which express notice in writing has been given to the debtor. The assignment of a mortgage by the mortgagee to his trustees, with a proviso for the reassignment of the mortgage to him in a certain event, is not an absolute assignment: *National Provincial Bank* v. *Harle*, 6 Q. B. D. 626; see also *Re Sutton's Trusts*, 12 Ch. D. 175, M. R.: *Southwell* v. *Scotter*, 49 L. J., Q. B. 356, C. A. An assignment of moneys not yet become due may be an absolute assignment: *Brice* v. *Bannister*, 3 Q. B. D. 569, C. A.

The sub-section relates to procedure, and does not make anything an assignment which was not an assignment before either at law or in equity, as for instance a cheque: *Schroeder* v. *The Central Bank*, 24 W. R. 710, C. P. D.; and see *Re Haycock's Policy*, 1 Ch. D. 611, M. R.; *Ex. p. Culling*, 9 Ch. D. 307, C. A.

Rights of debtor.

In *Young* v. *Kitchen*, 3 Ex. D. 127, the assignee of a chose in action sued the debtor. The debtor was allowed to counterclaim for breaches of contract by the assignor, in respect of the same transaction, but it was held that the amount of the counterclaim must be limited by the amount of the claim.

It would seem that relief by interpleader may be had under

this sub-section before action brought, see per Quain J., Re *New Hamburg Ry. Co.*, W. N., 1875, p. 239. As to payment into Court under this sub-section, see *Re Haycock's Policy*, 1 Ch. D. 611, and *Re Sutton's Trust*, 12 Ch. D. 175. Act 1873, s. 25 (7, 8).

As to the practice in interpleader, see O. I., r. 2, *post*, p. 176, and note thereto.

(7.) Stipulations in contracts, as to time or otherwise, which would not, *before the passing of this Act*, have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity. Stipulations not of the essence of contracts.

This sub-section has no application in an action commenced before the Act came into operation: *Noble* v. *Edwardes*, 5 Ch. D. 378, C. A.

By s. 10 of the Act of 1875, *post*, p. 102, the commencement of the Act (1st Nov., 1875) is substituted for the passing as the governing date in this sub-section.

As to the equitable construction of stipulations in contracts as to time, see *Tilley* v. *Thomas*, L. R. 3 Ch. 61, C. A.

(8.) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just: and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable. Mandamus. Injunctions and Receivers.

The words "just *or* convenient" in this sub-section must be construed as if they were "just *and* convenient." The power must be exercised, not arbitrarily, "but according to sufficient legal reasons, and on settled legal principles": See *Beddow* v.

Act 1873, s. 25 (8). *Beddow*, 9 Ch. D. at p. 93, M. R.; *Day* v. *Brownrigg*, 10 Ch. D. at p. 307, C. A.; *Gaskin* v. *Ball*, 13 Ch. D. 324.

The sub-section empowers the Court (1) to grant a mandamus; (2) an injunction; (3) to appoint a receiver. Whatever relief can be granted by an interlocutory order under this section, can of course be granted by a final order at the trial, *Beddow* v. *Beddow*, 9 Ch. D. at p. 93, M. R.

1.—MANDAMUS.

Mandamus. The power of the Court of Queen's Bench, by the prerogative writ of mandamus, at the instance of persons interested, to enforce legal rights of a public nature, where no other remedy exists, has been long exercised. See Tapping on Mandamus. It has been said by Hall, V.-C., that a Chancery Judge may now issue such a writ in a cause before him: *Re Paris Skating Rink Co.*, 6 Ch. D. 731, but this has been seriously doubted in the Court of Appeal: see *Glossop* v. *Heston Local Board*, 12 Ch. D. at 115, 122, C. A. As to the prerogative writ see *post*, O. LXII., p. 442, and note thereto; also note to s. 19, *ante*, p. 13, as to appeals.

By the Common Law Procedure Act, 1854, ss. 68 to 74, all the Common Law Courts were given a limited power of enforcing by mandamus the specific performance of legal duties. Under those sections the plaintiff in any action, other than replevin or ejectment, was entitled to indorse on his writ a claim for, and in his declaration to claim, and the Court might grant a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff was personally interested, and by the non-performance of which he showed in his declaration that he sustained or might sustain damage. It has been decided that the power so given is only in the case of duties of a public nature, not in the case of those arising simply by contract: *Benson* v. *Paull*, 6 E. & B. 273; *Norris* v. *Irish Land Co.*, 8 E. & B. 512. By the express terms of the Act it must be one in which the applicant is interested; and the remedy by mandamus is only available where there is no other effectual remedy: *Bush* v. *Beavan*, 1 H. & C. 500. Under this Act a mandamus has been granted to improvement commissioners, directing them to levy a rate to satisfy the claim of the plaintiff, a creditor: *Ward* v. *Lowndes*, 1 E. & E. 940, 956; to apply their funds in payment of debentures: *Webb* v. *Commissioners of Herne Bay*, 5 Q. B. 642; to a railway company, compelling them to give a notice to treat and proceed with the purchase of lands as to which they have given notice under their Act of an intention to take: *Morgan* v. *Metropolitan Ry. Co.*, L. R. 3 C. P. 553, 4 C. P. 97; see also *Tyson* v. *Mayor of London*, L. R. 7 C. P. 18; and to issue a precept for the assessment of compensation after a notice to treat has been given: *Fotherby* v. *Metropolitan Ry. Co.*, 2 C. P. 188; *Guest* v. *Poole and Bournemouth Ry. Co.*, 5 C. P., 553. See as to the discretion of the Court, *Nicholl* v. *Allen*, 1 B. & S. 916, 934. See also the Companies Acts, 1862, s. 35, and 1867, s. 26 (Day's C. L. P. Acts, 321, ed. 4).

The Court of Chancery has not used the process of mandamus, eo nomine. But in compelling the specific performance of contracts it has in substance used exactly the same mode of enforcing one class of rights which the Common Law Courts by mandamus have used in enforcing another.

The words of sub-section 8 are very wide: "A mandamus . . . may be granted . . . . *in all cases in which it shall appear to*

the Court to be just or convenient that such order should be made." It may be said, on the one hand, that these words cannot be intended merely to give to all Divisions such powers for the specific enforcement of rights as have hitherto been exercised by any of the Courts; for this has been already fully provided for by s. 16, and s. 24, sub-s. 7, *ante*, pp. 12, 24. And, moreover, the present section purports to deal not merely with procedure but with rules of law. On the other hand, it can hardly be supposed that the Legislature intended by these few words to give power to enforce specifically all rights and duties whatever, without regard to the doctrines previously well settled. Probably the true view is, that mandamus is to be understood strictly in the sense in which it has been used in the Common Law Courts; that the subject matters, the classes of rights, to which it is applicable, are unchanged; and that the effect of the new provision is, first, to give to the Court a very wide discretion as to the issue of the writ; and, secondly, to allow it to be issued upon an interlocutory application, instead of its necessarily being claimed upon the writ and by pleadings; without, in fact, an *action of mandamus* being brought within the meaning of the C. L. P. Act. Act 1873, s. 25 (8).

See as to indorsing the claim on the writ, *Colebourne* v. *Colebourne*, 1 Ch. D. 690, V.-C. H., where the question arose with reference to a receiver; and O. II., r. 1, *post*, p. 183, and note thereto. For a form of indorsement see App. A., *post*, p. 469, No. 74. As to the time and mode of applying for a mandamus under this section, see O. LII. r. 4, *post*, p. 396.

2.—INJUNCTION.

Injunctions; former law.

The power of the Common Law Courts to grant injunctions in ordinary actions depended upon ss. 79 to 82 of the C. L. P. Act, 1854, as amended by ss. 32, 33 of the C. L. P. Act, 1860. Under those Acts the plaintiff could only ask for an injunction when a breach of contract or other injury had actually been committed: for he must (s. 79) be entitled to maintain and have brought an action. As to when such a writ was granted see Day's C. L. P. Acts, pp. 325, *et seq.*, ed. 4. Power to grant injunctions in patent cases was given by the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83), s. 42; but under that section, too, the injunction could only be issued when an action was pending, and therefore after a cause of action had arisen. And by the Trade Marks Act (25 & 26 Vict. c. 88), s. 21, a like power was given as to trade marks.

Trespass.

The Court of Chancery has always, in the exercise of its traditional jurisdiction, granted injunctions to restrain the commission of threatened wrongs or the continuance or repetition of those already committed. But with regard to injunctions to restrain trespasses, somewhat refined distinctions have been drawn as to the power to interfere—first, according as the person sought to be restrained is in possession or not; and secondly, if out of possession, according as he is a mere trespasser or acts under colour of right. These distinctions have led to some uncertainty and inconvenience: see *Lowndes* v. *Bettle*, 33 L. J. Ch. 451; 10 Jur. (N. S.) 226, V.-C. K.; *Stanford* v. *Hurlstone*, L. R. 9 Ch. 116.

Right to injunction.

Sub-section 8 in express terms abolishes these distinctions, and moreover gives the High Court power to grant an injunction in all cases in which it appears just and convenient to do so. Even where a statute prohibits an Act under a penalty, the ancillary

Act 1873, s. 25 (8).

Injunction

remedy by injunction still remains, and the power given by this sub-section may be regarded as a supplement to all Acts of Parliament: *Cooper* v. *Whittingham*, 15 Ch. D. 501, M. R. In the exercise of this power, injunctions have been granted to restrain the respondent in a divorce suit after decree nisi from dealing with property which she claimed under a post nuptial settlement: *Noakes* v. *Noakes and Hill*, 4 P. D. 60; to restrain an arbitrator from acting as such, where in the opinion of the Court he was unfit or incompetent: *Beddow* v. *Beddow*, 9 Ch. D. 89, C. A.; to restrain, upon terms, a landlord from distraining for rent pending the determination of an action to try his right thereto: *Shaw* v. *Earl of Jersey*, 4 C. P. D. 359, C. A.; as a substitute for prohibition, to restrain proceedings in an inferior court: *Hedley* v. *Bates*, 13 Ch. D. 498; but see *Stannard* v. *Vestry of St. Giles*, 46 L. T. 243; to restrain a municipal corporation from declaring a corporate office void, and proceeding to elect thereto: *Aslatt* v. *Corporation of Southampton*, 16 Ch. D. 143, M. R.; to restrain an alleged creditor of a solvent company from presenting a petition to wind it up, when the debt was disputed: *Cercle Restaurant Co.* v. *Lavery*, 18 Ch. D. 555, M. R.; to restrain the defendant in a co-ownership action concerning shares in a ship from dealing with the shares *pendente lite*, and to restrain the registrar of shipping from registering any such dealing: *The Horlock*, 36 L. T. 622, Adm.; and to restrain the publication of a trade libel: *Saxby* v. *Easterbrook*, 3 C. P. D. 339; *Thorley's Cattle Food Co.* v. *Massam*, 14 Ch. D. 763, C. A.; *Thomas* v. *Williams*, 14 Ch. D. 864. An injunction will not be granted to restrain a married woman from parting with separate estate in respect of which she is being sued: *Robinson* v. *Pickering*, 16 Ch. D. 661, C. A.

Mandatory injunction.

Mandatory injunctions are still granted as before the Act: *Selley* v. *Pearson*, 28 W. R. 752: *Mullins* v. *Hawk*, 11 Ch. D. 763. As to the principles on which they are granted, see *Smith* v. *Smith*, L. R. 20 Eq. at 504, per Jessel, M. R.; and *Gaskin* v. *Balls*, 13 Ch. D. 324, C. A. An injunction will not be granted where the proper remedy is the prerogative writ of mandamus: *Glossop* v. *Heaton Local Board*, 12 Ch. D. 102, C. A.

Practice.

As to the discretion of the Court to grant or withhold an injunction, see *Doherty* v. *Allman*, 3 App. Cas. 709 (H. L.).

As to the consequences of disobedience to an injunction, and as to what is sufficient notice of an injunction, see *Ex parte Langley*, 13 Ch. D. 110, C. A.

The motion for the injunction is often, by consent, treated as the trial of the action, and the injunction, if granted, made perpetual, see *Aslatt* v. *Corp. of Southampton*, 16 Ch. D. at 150. Whatever can be done under this sub-section, can of course be done at the trial finally, *Beddow* v. *Beddow*, 9 Ch. D., at 93, M. R.: see *e.g.*, *Aslatt* v. *Corporation of Southampton*, 16 Ch. D. at 150, M. R. As to the mode of applying for the injunction and the practice on granting it, see O. LII., r. 4, and hereto, *post*, p. 396.

There is nothing in the Judicature Acts which repeals Lord Cairns' Act (21 & 22 Vict. c. 27, s. 2), which enables the Court to give damages in addition to or substitution for an injunction: *Fritz* v. *Hobson*, 14 Ch. D. 542; *Bowen* v. *Hall*, 6 Q. B. D. 333, C. A.: see *Krehl* v. *Burrell*, 11 Ch. D. 146, C. A., as to the limit of the power of the Court to substitute damages for an injunction. Under that Act damages may be given up to the date of judgment: *Fritz* v. *Hobson*, *ubi suprà* at p. 557, Fry, J.

The Public Health Act, 1875, entitles a local board to a month's

notice of action for anything done under the Act. An action for an injunction may, nevertheless, be maintained without notice, where the case is such that a bill would, but for the Judicature Act, have been filed in Chancery for an injunction, although damages be claimed by way of subsidiary relief: *Flower* v. *Low Leyton Local Board*, 5 Ch. D. 347, C. A. **Act 1873, s. 25 (8).**

3.—Receivers.

The Common Law Courts have hitherto had no power to appoint receivers. **Right to receiver.**

In Chancery the appointment of a receiver has been a remedy in familiar use. The Court, however, would not appoint a receiver at the instance of a mortgagee having the legal estate, or other person able to obtain protection at law: *Berney* v. *Sewell*, 1 J. & W. 647; *Burton* v. *Monkhouse*, G. Coop, 41; *Kelsey* v. *Kelsey*, L. R. 17 Eq. 495, V.-C. M. The present sub-section empowers the Court to appoint a receiver *in all cases in which it shall appear just or convenient*. The inclination is to construe these words very liberally, and it seems that a legal mortgagee may now obtain the appointment of a receiver instead of taking the risk of entering on the property. In *Pease* v. *Fletcher*, 1 Ch. D. 273, where the plaintiff was mortgagee of property, as to some of which his title was legal, and as to some equitable, Bacon, V.-C., appointed a receiver for the whole. In *Truman & Co.* v. *Redgrave*, 18 Ch. D. 547, where the mortgagor of an hotel forcibly prevented the mortgagee from taking possession under the mortgage, a receiver was appointed and an injunction granted to restrain the mortgagor from interfering with the management of the premises. It seems from the judgment of Jessel, M. R., that the receiver might have been appointed even if the mortgagor had not resisted. See further Seton, 4 ed., p. 431; *Ex parte Evans*, 13 Ch. D. 252, C. A.; and *Re Tomline*, 16 Ch. D. 723. As to the power of a mortgagee to appoint a receiver under the Conveyancing Act, 1881, see 44 & 45 Vict. c. 41, ss. 19, 24.

As to appointing a receiver in a partition suit prior to the hearing, where one of the parties was in occupation, though not in exclusive occupation of the property, see *Porter* v. *Lopes*, 7 Ch. D. 358; and in a creditor's administration action, see *Re Radcliffe*, 7 Ch. D. 733; and in a co-ownership suit in the Admiralty Division, see *The Ampthill*, 5 P. D. 224.

The term "interlocutory order" in this sub-section has been construed to mean any order in a cause other than final judgment. It applies to orders made after, as well as before, judgment: *Smith* v. *Cowell*, 6 Q. B. D. 75, C. A.; therefore where the plaintiff has obtained judgment, and the defendant has no legal estate, but has some equitable estate or interest, the plaintiff may obtain equitable execution by applying for a receiver in the original action, *ibid.*, and *Salt* v. *Cooper*, 16 Ch. D. 544, M. R. It is unnecessary to commence a fresh action, as was done in *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275, C. A. See, too, *Bryant* v. *Bull*, 10 Ch. D. 153, as to execution against separate estate of married woman. It seems, too, that it is unnecessary now to sue out a writ of *elegit* before applying under this sub-section for a receiver in order to obtain equitable execution. It is sufficient to make an affidavit of belief that the defendant has no legal estate: *Ex parte Evans*, 13 Ch. D. 252, C. A.

A receiver appointed in the ordinary way, upon giving security, has no title till his security is perfected: *Edwards* v. *Edwards*, 2 **Security.**

Act 1873, s. 25 (8). Practice.

Ch. D. 291, C. A.; but when security is given his title relates back to the date of the order, and his appointment is a delivery of lands by lawful authority within the meaning of s. 1 of 27 & 28 Vict. c. 112: *Ex parte Evans*, 13 Ch. D. 252, C. A. In a case of urgency the Court will appoint an interim receiver without security, and on an *ex parte* application before appearance: *Taylor* v. *Eckersley*, 2 Ch. D. 302, C. A.; and it will do so before service of the writ in the action if necessary: *Re H.'s Estate*, 1 Ch. D. 276, V.-C. H.; and see *Colebourne* v. *Colebourne*, *ibid.* 690, V.-C. H.; and *Hyde* v. *Warden*, 1 Ex. D. 309.

The appointment of a receiver may, by the terms of O. LII., r. 4, *post*, p. 396, be made on the application of any party: *Sargant* v. *Read*, 1 Ch. D. 600, M. R. When a creditor's administration action is commenced in a district registry the Court may appoint a receiver, and direct him to pass his accounts in the district registry: *Robertson* v. *Capper*, 26 W. R. 434.

For rules as to the proceedings to obtain the relief authorized by this sub-section, and for provisions as to other protective orders having an analogous object, see O. LII., *post*, p. 395, and note thereto. As to indorsing the claim on the writ, see *Colbourne* v. *Colbourne*, *ubi suprà*; and O. II., r. 1, *post*, p. 183, and note thereto.

An order under this sub-section may be made at the instance of a defendant without his bringing a cross action: *Sargant* v. *Read*, 1 Ch. D. 600, M. R.

Damages by collisions at sea.

(9.) In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail.

The common law doctrine has been shortly this:—The man who seeks damages against another for negligence must show three things: first, the negligence; secondly, the damage sustained; thirdly, that the negligence caused the damage. If he proves the negligence and the damage, but it turns out that he has himself been guilty of negligence of such a kind that, but for it, the damage would not have followed from the negligence of the defendant, he has failed to prove his third proposition; he is the author of his own wrong, and must bear the consequences: see per Parke, B., in *Bridge* v. *Grand Junction Ry. Co.*, 3 M. & W. 244, 248.

In the Admiralty Court the rule has been that where both parties are to blame they must share the loss equally: so that in such a case the plaintiff recovers half his damages: see cases collected in Williams & Bruce, Admiralty Practice, p. 72.

It will be observed that it is only in cases of collision between ships that the Common Law rule is changed. In all other cases it remains unaffected.

Custody of

(10.) In questions relating to the custody and education of infants, the rules of Equity shall prevail.

Act 1873, s. 25 (10) (11).

The common law rule upon this subject is stated as follows in *Re Andrews*, L. R. 8 Q. B., at p. 158 :—"It appears to have been the invariable practice of the Common Law Court, on an application for a *habeas corpus* to bring up the body of the child obtained from the father (and the case would be the same as to a testamentary guardian), to enforce the father's right to the custody, even against the mother, unless the child be of an age to judge for himself, or there be an apprehension of cruelty from the father, or contamination in consequence of his immorality or gross profligacy. If the infant be of an age to elect for himself, the Court will merely interfere so far as to get it free from illegal restraint, without handing it over to anybody. This was the course adopted in *Rex* v. *Delaval* (3 Burr. 1435), in the case of a girl eighteen years of age, who was delivered from a custody considered illegal, and left at liberty to go where she pleased. But, in the absence of any right of choice the Court goes further, and transfers the infant to the proper legal custody. The right to such an election, it has now been clearly decided, depends upon age alone, and not on mental capacity : see *Reg.* v. *Clarke*, 7 E. & B. 186 ; 26 L. J. Q. B. 169 ; and it may be taken as settled that no such choice can be made, at all events by a female infant, under the age of sixteen years."

The Court of Chancery, whenever there has been any trust property of which it would undertake the administration, and so make the infant a ward of court, has taken a less rigid view of the rights of the father or guardian, and looked more to the interest of the infant. Either father or guardian may lose his right to the custody of the child, not only by immorality of a nature likely to contaminate the child, or ill usage, but also by allowing the child to be brought up in a religion other than his own, or under the control and influence of persons other than himself, for so long a time and under such circumstances that to allow him to reclaim the control of the child, and the direction of its education, would be detrimental to its interest : *Lyons* v. *Blenkin*, Jac. 245 ; *Hill* v. *Hill*, 10 W. R. 400, V.-C. Wood ; *Andrews* v. *Salt*, L. R. 8 Ch. 622. After the decease of the father, the general rule is that the Court or guardian must have regard to the religion and the wishes of the father in bringing up the child ; but under special circumstances the Court of Chancery has, on like grounds, disregarded the express or presumed desire of the deceased father with regard to the education of his child : *Stourton* v. *Stourton*, 8 D. M. & G. 760.

As to the application of this sub-section, see *Re Goldsworthy*, 2 Q. B. D. 75 ; *Re Taylor*, 4 Ch. D. 157, M. R. ; *Besant* v. *Wood*, 12 Ch. D. 605, M. R.

Cases of conflict not enumerated.

(11.) Generally, in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of Equity and the rules of the Common Law with reference to the same matter, the rules of Equity shall prevail.

Rules of law.

In accordance with this sub-section it has, in several cases, been held at Chambers, on interpleader between execution creditors and claimants under bills of sale, that where the terms of the bill of sale were such as to bind after-acquired goods in equity, according

Act 1873, ss. 25, 26.

to the principles laid down in *Holroyd* v. *Marshall*, 10 H. L. C. 191, the title of the claimant to such goods must prevail as against the execution creditor: *Anon.*, W. N. 1875, p. 203, per Lush, J.; *Anon.*, W. N. 1876, p. 64, per Archibald, J. So too where assets have come into the possession of an executor, and have afterwards been lost to the estate, the equitable rule now prevails that an executor is to be deemed a gratuitous bailee, who, therefore, can only be made liable in case of wilful default, *Job* v. *Job*, 6 Ch. D. 562. As to the mode of charging such default, see *Mayer* v. *Murray*, 8 Ch. D. at 426. So also the equitable rule now prevails that payment in full by an executor to a creditor is valid, although he had notice that an administration action had been commenced by another creditor, provided the payment be made before judgment: *Re Radcliffe*, 7 Ch. D. 733. So also the equity rules as to the right to discovery now prevail, *Anderson* v. *Bank of England*, 2 Ch. D. at 654, 658, C. A. *Allhusen* v. *Labouchere*, 3 Q. B. D. at 666, C. A. See further *Grant* v. *Holland*, 3 C. P. D. 180, as to an order for changing solicitors, and *Kendall* v. *Hamilton*, 4 App. Cas. 504, H. L., as to the joint and several liabilities of partners in respect of contracts. And see *Heath* v. *Pugh*, 6 Q. B. D. at 362, C. A. as to rights of mortgagor. As to the effect of an agreement for a lease, see *Walsh* v. *Lonsdale*, W. N. 1882, p. 52, C. A.

Rules of practice.

It is to be observed that this sub-section applies only to substantive law. By s. 21 of the Act of 1875 it is provided that where not inconsistent with the Act and Rules the then existing practice and procedure are to remain in force; and the Court of Appeal has laid down that, in cases not provided for by the new procedure, where there was a variance between the practice of the Court of Chancery and the Common Law Courts, the rule of practice which appears most convenient will be adopted: *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong*, 13 Ch. D. 310, C. A.; see too *Nurse* v. *Durnford*, 13 Ch. D. 764, M. R. In both these cases the Common Law rule was followed. See also *Clarborough* v. *Twothill*, 17 Ch. D. 787, when an order under 3 & 4 Will. IV. c. 42, s. 40, was made on summons in the Chancery Division to compel the attendance of a witness before an arbitrator: *Morris* v. *Freeman*, 3 P. D. at 69, per Hannen, J.; *Le Grange* v. *McAndrew*, 4 Q. B. D. at 211.

PART III.

Sittings and Distribution of Business.

Sect. 26. Abolition of terms, except as measures of time.

26. The division of the legal year into terms shall be abolished so far as relates to the administration of justice; and there shall no longer be terms applicable to any sitting or business of the High Court of Justice, or of the Court of Appeal, or of any Commissioners to whom any jurisdiction may be assigned under this Act; but in all other cases in which, under the law now existing, the terms into which the legal year is divided are used as a measure for determining the time at or within which any act is required to be done, the same may continue to be

referred to for the same or the like purpose, unless and until provision is otherwise made by any lawful authority. Subject to rules of Court, the High Court of Justice and the Court of Appeal, and the judges thereof respectively, or any such commissioners as aforesaid, shall have power to sit and act, at any time, and at any place, for the transaction of any part of the business of such Courts respectively, or of such judges or commissioners, or for the discharge of any duty which by any Act of Parliament, or otherwise, is required to be discharged during or after term. Act 1873, ss. 26, 27.

For the Rules as to the sitting of the court, see O. LXI., *post*, p. 437.

As to jurisdiction on circuit, see ss. 29 and 37, *post*, pp. 38, 50, and notes thereto.

By 9 & 10 Will. III., c. 15, s. 2, a motion to set aside an award unduly obtained must be made before the last day of the next term. It has been held, by reason of the saving clause in the present section, that this rule still prevails; and that therefore where an award was made on the 28th March a motion to set it aside, made after the 8th of May, was too late, Easter term beginning the 15th April and ending the 8th May: *College of Christ* v. *Martin*, 3 Q. B. D. 16, C. A.; see too *Smith* v. *Parkside Mining Co.*, 6 Ex. D. 67.

27. Her Majesty in Council may from time to time, upon any report or recommendation of the judges by whose advice Her Majesty is hereinafter authorized to make rules before the commencement of this Act, and after the commencement of this Act upon any report or recommendation of the Council of Judges of the Supreme Court hereinafter mentioned, with the consent of the Lord Chancellor, make, revoke, or modify, orders regulating the vacations to be observed by the High Court of Justice and the High Court of Appeal, and in the offices of the said Courts respectively; and any Order in Council made pursuant to this section shall, so long as it continues in force, be of the same effect as if it were contained in this Act; and rules of court may be made for carrying the same into effect in the same manner as if such Order in Council were part of this Act. In the meantime, and subject thereto, the said vacations shall be fixed in the same manner, and by the same authority, as if this Act had not passed. This section shall come into operation immediately upon the passing of this Act. Sect. 27. Vacations.

As to the power to make rules before the commencement of the Act, see *post*, pp. 108, 110. As to Councils of Judges, see s. 75, *post*, p. 74.

Act 1873, ss. 27—29. By s. 17 of the Act of 1875, *post*, p. 109, the reference to judges in this section is to be deemed to be to the judges mentioned in that section. As to the body by which rules are now made, see s. 17 of the Act of 1876, *post*, p. 136.

As to vacations, see O. LXI., rr. 2 and 3, *post*, p. 437.

Sect. 28. Sittings in vacation.

28. Provision shall be made by Rules of Court for the hearing, in London or Middlesex, during vacation by Judges of the High Court of Justice and the Court of Appeal respectively, of all such applications as may require to be immediately or promptly heard.

It is only under this section that applications are heard at all during vacation; and under it only such applications are to be heard as "require to be immediately or promptly heard." Under O. LXI., r. 5, *post*, p. 438, vacation judges are appointed to hear such applications; and only those judges, or such other judges as may sit for them, under r. 6 of the same order, have jurisdiction in vacation: Per Lush and Lopes, JJ., 24th Sept. 1877. The same learned judges laid down the rule that applications for judgment under O. XIV., will be heard in vacation as urgent, if the right to the order accrues in vacation, but not if there was an opportunity to apply before vacation.

Sect. 29. Jurisdiction of Judges of High Court on circuit.

29. Her Majesty, by commission of assize or by any other commission, either general or special, may assign to any Judge or Judges of the High Court of Justice or other persons usually named in commissions of assize, the duty of trying and determining within any place or district specially fixed for that purpose by such commission, any causes or matters, or any questions or issues of fact or of law, or partly of fact and partly of law, in any cause or matter depending in the said High Court, or the exercise of any civil or criminal jurisdiction capable of being exercised by the said High Court; and any commission so granted by Her Majesty shall be of the same validity as if it were enacted in the body of this Act; and any commissioner or commissioners appointed in pursuance of this section shall, when engaged in the exercise of any jurisdiction assigned to him or them in pursuance of this Act, be deemed to constitute a Court of the said High Court of Justice; and, subject to any restrictions or conditions imposed by rules of court and to the power of transfer, any party to any cause or matter involving the trial of a question or issue of fact, or partly of fact and partly of law, may, with the leave of the judge or judges to whom or to whose division the cause or matter is assigned, require the question or issue to be tried and determined by a commissioner or commissioners as afore-

said, or at sittings to be held in Middlesex or London, as hereinafter in this Act mentioned, and such question or issue shall be tried and determined accordingly. Act 1873, ss. 29, 30.

A cause or matter not involving any question or issue of fact may be tried and determined in like manner with the consent of all the parties thereto.

By s. 26, *ante*, p. 36, subject to rules of Court, Commissioners of Assize may sit at any time or place. S. 37, *post*, p. 50, as modified by s. 8 of the Act of 1875, and s. 15 of the Act of 1876, determines what judges are to go circuit. By s. 93, *post*, p. 90, the existing circuits were left unaffected for the present, so far as this Act is concerned. S. 23 of the Act of 1875, *post*, p. 113, gives power to the Queen in Council to alter the circuits of the judges, and make the various changes necessary for that purpose. And an Order in Council, dated the 5th February, 1876, amended by Order of 17th May, 1876, has accordingly been issued: *post*, pp. 690 to 696. By the Winter Assizes Acts, 1876 and 1877, counties may be, by Order in Council, united for the purpose of a winter assize, that is, an assize during Sept., Oct., Nov., Dec., or Jan.; and the jurisdiction of the Central Criminal Court may, during the same period, be extended.

Court. A Commissioner of Assize, whether a judge of one of the Supreme Courts or not, was formerly a mere commissioner to try the issues of fact entered for trial, having power to try those only, and with various incidental powers as to amending, certifying, and otherwise, chiefly conferred upon him by statute. Under section 29, every Commissioner of Assize constitutes a Court, with all the powers, therefore, of a Court. With regard to the powers and duties of the judge in disposing of the case at the trial, and with regard to trials generally, see s. 46, *post*, p. 57, and note thereto; and O. XXXVI., r. 22A, *post*, p. 327, and note thereto.

As to the right of any party to have issues of fact tried by a jury, see O. XXXVI., r. 3, *post*, p. 319.

As to the power of a judge to order a trial by a jury, see *ibid.*, r. 27, *post*, p. 330.

As to the power of a judge to send a question to the assizes for trial, see *ibid.*; and as to cases in the Chancery Division, see *ibid.*, rr. 29, 29A, *post*, pp. 330, 331.

As to sittings in London and Middlesex, see the next section.

Sect. 30. Sittings for trial by jury in London and Middlesex.

30. Subject to Rules of Court, sittings for the trial by jury of causes and questions or issues of fact shall be held in Middlesex and London, and such sittings shall, so far as is reasonably practicable, and subject to vacations, be held continuously throughout the year by as many judges as the business to be disposed of may render necessary. Any Judge of the High Court of Justice sitting for the trial of causes and issues in Middlesex or London, at any place heretofore accustomed, or to be hereafter determined by rules of court, shall be deemed to constitute a court of the said High Court of Justice.

Act 1873, ss. 30, 31.

As to the judges to preside at jury trials in London, Middlesex, and the Assizes, see s. 37, *post*, p. 50.

As to the sittings and vacations, see O. LXI., *post*, p. 438.

As to the provision that the judge is to constitute a court, see note to the last section.

As to the power of a judge to send a question for trial to these sittings, see O. XXXVI., r. 29, *post*, p. 330.

Sect. 31. Divisions of the High Court of Justice.

31. For the more convenient despatch of business in the said High Court of Justice (but not so as to prevent any judge from sitting whenever required in any Divisional Court, or for any judge of a different division from his own), there shall be in the said High Court five divisions consisting of such number of judges respectively as hereinafter mentioned. Such five divisions shall respectively include, immediately on the commencement of this Act, the several judges following; (that is to say)—

(1.) One division shall consist of the following judges; (that is to say)—The Lord Chancellor, who shall be President thereof, the Master of the Rolls, and the Vice-Chancellors of the Court of Chancery, or such of them as shall not be appointed ordinary Judges of the Court of Appeal:

(2.) One other division shall consist of the following judges; (that is to say)—The Lord Chief Justice of England, who shall be President thereof, and such of the other Judges of the Court of Queen's Bench as shall not be appointed ordinary Judges of the Court of Appeal:

(3.) One other division shall consist of the following judges; (that is to say)—The Lord Chief Justice of the Common Pleas, who shall be President thereof, and such of the other Judges of the Court of Common Pleas as shall not be appointed ordinary Judges of the Court of Appeal:

(4.) One other division shall consist of the following judges; (that is to say)—The Lord Chief Baron of the Exchequer, who shall be President thereof, and such of the other Barons of the Court of Exchequer as shall not be appointed ordinary Judges of the Court of Appeal:

(5.) One other division shall consist of two judges, who, immediately on the commencement of this Act, shall be the existing Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes and the existing Judge of the High

Court of Admiralty, unless either of them is appointed an ordinary Judge of the Court of Appeal. The existing Judge of the Court of Probate shall (unless so appointed) be the President of the said division, and subject thereto the Senior Judge of the said division, according to the order of precedence under this Act, shall be President. Act 1873, ss. 31, 32.

The said five divisions shall be called respectively the Chancery Division, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce, and Admiralty Division.

Any deficiency of the number of five judges for constituting, in manner aforesaid, immediately on the commencement of this Act, any one or more of the Queen's Bench, Common Pleas, and Exchequer Divisions, may be supplied by the appointment, under Her Majesty's Royal Sign Manual, either before or after the time fixed for the commencement of this Act, of one of the puisne justices or junior barons of any superior Court of Common Law from which no judge may be appointed as aforesaid to the Court of Appeal, to be a judge of any division in which such deficiency would otherwise exist. And any deficiency of the number of three Vice-Chancellors, or of the two Judges of the Probate and Admiralty Divisions,[1] at the time of the commencement of this Act, may be supplied by the appointment of a new judge in his place, in the same manner as if a vacancy in such office had occurred after the commencement of this Act.

Any judge of any of the said divisions may be transferred by Her Majesty, under Her Royal Sign Manual, from one to another of the said divisions.

Upon any vacancy happening among the judges of the said High Court, the judge appointed to fill such vacancy shall, subject to the provisions of this Act, and to any rules of court which may be made pursuant thereto, become a member of the same division to which the judge whose place has become vacant belonged.

As to the number of judges, see s. 5, and note thereto, *ante*, p. 3. See next section and note thereto as to the re-constitution of the Divisions by the Order in Council of 16 December, 1880, and the Act of 1881.

32. Her Majesty in Council may from time to time, upon any report or recommendation of the Council of Sect. 32. Power to alter divi-

[1] *Sic.*

Act 1873, s. 32.

sions and abolish, certain offices by Order in Council.

Judges of the Supreme Court hereinafter mentioned, order that any reduction or increase in the number of divisions of the High Court of Justice, or in the number of the judges of the said High Court who may be attached to any such division, may, pursuant to such report or recommendation, be carried into effect; and may give all such further directions as may be necessary or proper for that purpose; and such order may provide for the abolition on vacancy of the distinction of the offices of any of the following judges, namely, the Chief Justice of England, the Master of the Rolls, the Chief Justice of the Common Pleas, and the Chief Baron of the Exchequer, which may be reduced, and of the salaries, pensions, and patronage attached to such offices, from the offices of the other Judges of the High Court of Justice, notwithstanding anything in this Act relating to the continuance of such offices, salaries, pensions, and patronage: but no such Order of Her Majesty in Council shall come into operation until the same shall have been laid before each House of Parliament for thirty days on which that House shall have sat, nor if, within such period of thirty days, an address is presented to Her Majesty by either House of Parliament, praying that the same may not come into operation. Any such Order, in respect whereof no such address shall have been presented to Her Majesty, shall, from and after the expiration of such period of thirty days, be of the same force and effect as if it had been herein expressly enacted; provided always, that the total number of the Judges of the Supreme Court shall not be reduced or increased by any such Order.

Merger of Common Pleas and Exchequer Divisions in Queen's Bench.

As to Councils of Judges, see s. 75, *post*, p. 74.

Pursuant to the powers given by this section, an Order in Council has been made abolishing the offices of Chief Justice of the Common Pleas and Chief Baron of the Exchequer, and substituting ordinary judges for them, and consolidating the three Common Law Divisions into one Division, to be called the Queen's Bench Division. Subjoined is the order:—

ORDER in COUNCIL, dated 16th December, 1880, for the Consolidation and Union of certain DIVISIONS of the HIGH COURT OF JUSTICE.

At the Court at Windsor, the 16th day of December, 1880.

Present:—The QUEEN'S Most Excellent Majesty in Council.

WHEREAS by "The Supreme Court of Judicature Act, 1873," it is enacted that Her Majesty in Council may from time to time, upon any report or recommendation of the Council of Judges of the Supreme Court in the said Act mentioned, order that any reduction or increase in the number of divisions of the High Court of Justice may, pursuant to such report or recommendation, be

carried into effect; and may give all such further directions as may be necessary or proper for that purpose; and such Order may provide for the abolition on vacancy of the distinction of the offices of (amongst others) the Chief Justice of the Common Pleas and the Chief Baron of the Exchequer, and of the salaries, pensions, and patronage attached to such offices, from the offices of the other Judges of the High Court of Justice, notwithstanding anything in the said Act relating to the continuance of such offices, salaries, pensions, and patronage, but no such Order of Her Majesty in Council shall come into operation until the same shall have been laid before each House of Parliament for thirty days on which that House shall have sat, nor if within such period of thirty days an Address is presented to Her Majesty by either House of Parliament, praying that the same may not come into operation. Any such Order in respect whereof no such Address shall have been presented to Her Majesty, shall, from and after the expiration of such period of thirty days, be of the same force and effect as if it had been in the said Act expressly enacted; Provided always, that the total number of the Judges of the Supreme Court shall not be reduced or increased by any such Order. Act 1873, s. 32.

And whereas at a meeting of a Council of the Judges of the Supreme Court of Judicature duly assembled at Her Majesty's Palace of Westminster, on the 27th day of November, 1880, pursuant to the Supreme Court of Judicature Act, 1873, Section 75, and continued by adjournment on the 29th of the same month,

It was resolved:

That a Report be humbly made and submitted to Her Majesty by this Council of Judges, pursuant to the Supreme Court of Judicature Act, 1873, Section 32, to the following effect:—

(A.) That in the opinion of this Council of Judges it is expedient that the number of the Divisions of Her Majesty's High Court of Justice be reduced by the consolidation and union in one Division of all the Judges now attached respectively to the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division.

(B.) That the Lord Chief Justice of England be the President of the Division to be so formed by such consolidation and union.

(C.) That the Division to be so formed be called "The Queen's Bench Division."

(D.) That all causes and matters which, at the time when any Order in Council for the purpose of carrying these recommendations into effect, shall come into operation, may be pending in any of the three Divisions to be so united and consolidated, be transferred to the Queen's Bench Division to be so formed as aforesaid, and that all proceedings of every kind which may be then pending in any such causes or matters be continued, carried on, and completed in the Queen's Bench Division to be so formed as aforesaid, in the same manner in all respects as they would have been in the Division to which they were previously assigned if the same had not been united or consolidated with such other two Divisions as aforesaid.

Act 1873, s. 32.

Merger of Common Pleas and Exchequer Divisions in Queen's Bench.

(E.) That all causes, matters, and other proceedings, which by or under the Supreme Court of Judicature Act, 1873, or any Act amending the same, or any rule or order made pursuant thereto, have been or are assigned to the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division respectively of her Majesty's High Court of Justice, be, from and after the time when such Order in Council as aforesaid shall take effect, assigned to the Queen's Bench Division, to be formed by such consolidation and union as aforesaid.

(F.) That the office of Lord Chief Baron being now vacant, that office be reduced to an equality with the offices of the other Judges of Her Majesty's High Court of Justice who are not *ex-officio* Judges of Her Majesty's Court of Appeal, by the abolition of the rank and title of Lord Chief Baron of the Exchequer, and of all other distinctions between the office of any Judge who may be hereafter appointed to fill the place in the said High Court of Justice now vacant by the death of the late Lord Chief Baron of the Exchequer, and the offices of the other Judges of the said High Court of Justice who are not *ex-officio* Judges of Her Majesty's Court of Appeal, and between the salary, pension, and patronage attached to such office, and the salaries, pensions, and patronage of such other Judges of the said High Court of Justice as aforesaid.

(G.) That upon the vacancy in the office of Lord Chief Justice of the Common Pleas, now about to take place by the promotion of the present Lord Chief Justice of the Common Pleas (of which Her Majesty has been graciously pleased to approve) to the office of Lord Chief Justice of England, the office which will so become vacant be reduced to an equality with the offices of the other Judges of Her Majesty's High Court of Justice who are not *ex-officio* Judges of her Majesty's Court of Appeal, by the abolition of the rank and title of Lord Chief Justice of the Common Pleas, and of all other distinctions between the office of any Judge who may be hereafter appointed to fill the place in the said High Court of Justice now about to be vacated as aforesaid, and the offices of the other Judges of the said High Court of Justice who are not *ex-officio* Judges of Her Majesty's Court of Appeal, and between the salary, pension, and patronage attached to such office, and the salaries, pensions, and patronage of such other Judges of the said High Court of Justice as aforesaid.

(H.) That it be humbly recommended by this Council of Judges to Her Majesty, that an Order in Council be made by Her Majesty, if Her Majesty shall so please, for the purpose of carrying this Report, and the recommendations therein contained, into effect, in the manner provided by the Supreme Court of Judicature Act, 1873, Section 32.

And whereas it has seemed fit to Her Majesty, by and with the advice of Her Privy Council, that the said Report, and the recommendations therein contained, be carried into effect. Now, therefore, Her Majesty, by and with the advice aforesaid, is pleased to order, and it is hereby ordered, as follows :—

That the number of the Divisions of Her Majesty's High Court of Justice be reduced by the consolidation and union

of all the Judges now attached respectively to the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division in one division, to be called "The Queen's Bench Division," under the presidency of the Lord Chief Justice of England. Act 1873, s. 32.

That the office of Lord Chief Justice of the Common Pleas being now vacant be reduced to an equality with the offices of the other Judges of Her Majesty's High Court of Justice, who are not *ex-officio* Judges of Her Majesty's Court of Appeal, by the abolition of the rank and title of Lord Chief Justice of the Common Pleas, and of all other distinctions between the office of any Judge who may be hereafter appointed to fill the place in the said High Court of Justice now vacant as aforesaid, and the offices of the other Judges of the said High Court of Justice who are not *ex-officio* Judges of Her Majesty's Court of Appeal, and between the salary, pension, and patronage attached to such office, and the salaries, pensions, and patronage of such other Judges of the said High Court of Justice as aforesaid.

That the office of Lord Chief Baron being now vacant, that office be reduced to an equality with the offices of the other Judges of Her Majesty's High Court of Justice who are not *ex-officio* Judges of Her Majesty's Court of Appeal, by the abolition of the rank and title of Lord Chief Baron of the Exchequer, and of all other distinctions between the office of any Judge who may be hereafter appointed to fill the place in the said High Court of Justice now vacant as last aforesaid, and the offices of the other Judges of the said High Court of Justice who are not *ex-officio* Judges of Her Majesty's Court of Appeal, and between the salary, pension, and patronage attached to such office, and the salaries, pensions, and patronage of such other Judges of the said High Court of Justice as aforesaid.

And for the purpose of carrying into effect the consolidation and union of the said Divisions in manner aforesaid, it is hereby further ordered:

That all causes and matters which at the time when this Order shall, pursuant to the Supreme Court of Judicature Act, 1873, take effect, may be pending in any of the three Divisions to be so united and consolidated, be transferred to the Queen's Bench Division to be so formed as aforesaid, and that all proceedings of every kind which may be then pending in any such causes or matters be continued, carried on, and completed in the Queen's Bench Division to be so formed as aforesaid, in the same manner in all respects as they would have been in the Division to which they were previously assigned if the same had not been united or consolidated with such other two divisions as aforesaid.

That all causes, matters, and other proceedings, which by or under the Supreme Court of Judicature Act, 1873, or any Act amending the same, or any rule or order made pursuant thereto, have been or are assigned to the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division respectively of Her Majesty's High Court of Justice, be, from and after the time when this Order, pursuant to the said Supreme Court of Judicature Act, 1873, shall take effect,

Act 1873, ss. 32, 33.

assigned to the Queen's Bench Division, to be formed by such consolidation and union as aforesaid.

Merger of Common Pleas and Exchequer Divisions in Queen's Bench.

That all proceedings which have heretofore, by any law or custom other than such Acts of Parliament, rules, and orders as aforesaid, been taken or had respectively in the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division of the said High Court of Justice, be, from and after the time when this Order shall take effect, taken and had in the Queen's Bench Division of the said High Court of Justice, to be so formed by such consolidation and union as aforesaid.

That all powers and authorities which, by any law or custom have heretofore been exercised by the Chief Justice of the Common Pleas and the Chief Baron of the Exchequer respectively, shall, from and after the time when this Order shall take effect, be capable of being exercised by the Lord Chief Justice of England, unless such exercise thereof shall be contrary or repugnant to any express provision in any Act of Parliament contained.

That this order shall take effect and come into operation at the end of thirty days after the same shall have been laid before each House of Parliament, pursuant to the Supreme Court of Judicature Act, 1873, unless within such period of thirty days an Address shall have been presented to Her Majesty by either House of Parliament, praying that the same may not come into operation.

(Signed) *C. L. Peel.*

The Act of 1881 makes further provision for carrying out the objects of this Order in Council. By s. 13, *post*, p. 166, the selection of judges for the trial of election petitions is provided for; by ss. 16 and 17, *post*, p. 168, the nomination of sheriffs and the presentation and swearing of the Lord Mayor of London are dealt with; and by ss. 24, 25, and 26, *post*, pp. 171, 172, provision is made for the performance of functions heretofore devolving on the Chief Justice of the Common Pleas Division and the Chief Baron.

Sect. 33.

Rules of Court to provide for distribution of business.

33. All causes and matters which may be commenced in, or which shall be transferred by this Act to, the High Court of Justice, shall be distributed among the several divisions and judges of the said High Court, in such manner as may from time to time be determined by any rules of court, or orders of transfer, to be made under the authority of this Act; and in the meantime, and subject thereto, all such causes and matters shall be assigned to the said divisions respectively, in the manner hereinafter provided. Every document by which any cause or matter may be commenced in the said High Court shall be marked with the name of the division, or with the name of the judge, to which or to whom the same is assigned.

As to the distribution of business among the several divisions, see ss. 34 and 35, *infra*; s. 11 of the Act of 1875, *post*, p. 104; and O. V., r. 4, *post*, p, 193, and note thereto.

With respect to the transfer of actions or questions, see ss. 35 and 36, *post*, pp. 49, 50; s. 11, sub-s. 2, of the Act of 1875, *post*, p. 105; and O. LI., rr. 1 to 3, *post*, pp. 388 to 391, and note thereto. **Act 1873, ss. 33, 34.**

As to marking with the name of the division, see s. 35, and s. 11 of the Act of 1875, *post*, p. 104, and O. V., r. 9, *post*, p. 195.

And as to marking with the name of a judge in the case of actions in the Chancery Division, see s. 42, *post*, p. 53, and note thereto.

Sect. 34. Assignment of certain business to particular divisions of High Court subject to rules.

34. There shall be assigned (subject as aforesaid) to the Chancery Division of the said Court:—

(1.) All causes and matters pending in the Court of Chancery at the commencement of this Act:

(2.) All causes and matters to be commenced after the commencement of this Act, under any Act of Parliament, by which exclusive jurisdiction in respect to such causes or matters has been given to the Court of Chancery, or to any judges or judge thereof respectively, except appeals from County Courts;

As to appeals from County Courts, see s. 45, *post*, p. 55. As to the construction of this sub-section, see *Rogers* v. *Jones*, 7 Ch. D. at 349, per Jessel, M. R. By s. 69 of the Conveyancing and Law of Property Act, matters arising under it are assigned to the Chancery Division.

(3.) All causes and matters for any of the following purposes:—

The administration of the estates of deceased persons:

The dissolution of partnerships or the taking of partnership or other accounts;

The redemption of foreclosure of mortgages;

The raising of portions, or other charges on land;

The sale and distribution of the proceeds of property subject to any lien or charge;

The execution of trusts, charitable or private;

The rectification, or setting aside, or cancellation of deeds or other written instruments;

The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases;

The partition or sale of real estates;

The wardship of infants and the care of infants estates.

See *Storey* v. *Waddle*, 4 Q. B. D. 289, C. A.; and O. LI., *post*, p. 388.

Act 1873, s. 34.

There shall be assigned (subject as aforesaid) to the Queen's Bench Division of the said Court:—

Matters assigned to particular Divisions.

(1.) All causes and matters, civil and criminal, pending in the Court of Queen's Bench at the commencement of this Act:

(2.) All causes and matters, civil and criminal, which would have been within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction, if this Act had not passed.

See O. LXII., *post*, p. 443, as to the Crown side of the Queen's Bench Division and Criminal matters. The Common Pleas and Exchequer Divisions have now been merged in the Queen's Bench Division: see s. 32, *ante*, p. 41, and note thereto; so that where the term "Common Pleas Division" or "Exchequer Division" occurs in any Act or rule, it must now be read as if it was "Queen's Bench Division."

There shall be assigned (subject as aforesaid) to the Common Pleas Division of the said Court:—

(1.) All causes and matters pending in the Court of Common Pleas at Westminster, the Court of Common Pleas at Lancaster, and the Court of Pleas at Durham, respectively, at the commencement of this Act;

(2.) All causes and matters which would have been within the exclusive cognizance of the Court of Common Pleas at Westminster, if this Act had not passed.

There shall be assigned (subject as aforesaid) to the Exchequer Division of the said Court:—

(1.) All causes and matters pending in the Court of Exchequer at the commencement of this Act;

(2.) All causes and matters which would have been within the exclusive cognizance of the Court of Exchequer, either as a Court of Revenue or as a Common Law Court, if this Act had not passed.

See O. LXII., *post*, p. 443, as to the Revenue side of the Court of Exchequer.

By s. 10 of the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), which regulates the collection of the Land Tax, Inhabited House Duty, Property Tax and Income Tax, "all matters within the jurisdiction of the High Court under this Act shall be assigned in England, subject to the Acts regulating the High Court, to the Exchequer Division of Her Majesty's High Court of Justice in

England." See further ss. 59, 107, 111 of that Act, which give the jurisdiction above referred to. **Act 1873, ss. 34, 35.**

An application for a rule calling upon justices to state a case under 20 & 21 Vict. c. 43, must be made to the Queen's Bench Division, and not to the Divisional Court, which takes appeals from inferior courts under s. 45, *post*, p. 55: *Re Ellershaw*, 1 Q. B. D. 481. **Matters assigned to particular Divisions.**

(3.) *All matters pending in the London Court of Bankruptcy at the commencement of this Act;*

(4.) *All matters to be commenced after the commencement of this Act under any Act of Parliament by which exclusive jurisdiction in respect to such matters has been given to the London Court of Bankruptcy.*

This is repealed so far as relates to bankruptcy by the Act of 1875, *post*, p. 127. And it is provided instead, that a judge of the High Court shall be Chief Judge in Bankruptcy: see s. 3, *ante*, p. 2, and note thereto.

There shall be assigned (subject as aforesaid) to the Probate, Divorce, and Admiralty Division of the said High Court:

(1.) All causes and matters pending in the Court of Probate, or in the Court for Divorce and Matrimonial Causes, or in the High Court of Admiralty, at the commencement of this Act;

(2.) All causes and matters which would have been within the exclusive cognizance of the Court of Probate, or the Court for Divorce and Matrimonial Causes, or of the High Court of Admiralty, if this Act had not passed.

See s. 11, sub-s. 3 of the Act of 1875, *post*, p. 105, which supplements this sub-section by providing that a plaintiff shall not assign any cause or matter to this Division which he could not formerly have commenced in the Divorce, Probate, or Admiralty Courts.

As to County Court Appeals in Admiralty matters, see *The Two Brothers*, 1 P. D. 52; see also ss. 42 and 45, and note to the latter section, *post*, pp. 53, 55; and O. LVIII. r. 19, *post*, p. 430.

35. [*Option for any plaintiff (subject to rules) to choose in what division he will sue.*] **Sect. 35.**

This section is repealed by s. 35 of the Act of 1875, *post*, pp. 125, 127, and s. 11 of that Act is substituted for it.

By the repealed section 35, a plaintiff, subject to Rules of Court, could not have commenced in the Probate, Divorce, and Admiralty Division any action except such as would have been within the *exclusive* cognizance of the Probate, Divorce, or Admiralty Court. But see now O. V., r. 4, *post*, p. 193.

As to transfer, see O. LI., rr. 1 to 3, *post*, pp. 388 to 393.

Act 1873, ss. 36—38. As to marking the writ with the name of the division and notice to the officer, see O. II., r. 1, and O. V., r. 9, *post*, pp. 183, 195.

Sect. 36. Power of transfer.

36. Any cause or matter may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by such authority and in such manner as Rules of Court may direct, from one division or judge of the High Court of Justice to any other division or judge thereof, or may by the like authority be retained in the division in which the same was commenced, although such may not be the proper division to which the same cause or matter ought, in the first instance, to have been assigned.

For Rules as to the transfer of causes, see O. LI., rr. 1 to 3, *post*, pp. 388 to 393, and note thereto, where the subject is considered: also s. 11 of the Act of 1875, *post*, p. 104, and note to last section.

Sect. 37. Sittings in London and Middlesex and on Circuits.

37. Subject to any arrangements which may be from time to time made by mutual agreement between the judges of the said High Court, the sittings for trials by jury in London and Middlesex, and the sittings of Judges of the said High Court under Commissions of Assize, Oyer and Terminer, and Gaol Delivery, shall be held by or before judges of the Queen's Bench, Common Pleas, or Exchequer Division of the said High Court: Provided, that it shall be lawful for Her Majesty, if she shall think fit, to include in any such commission any ordinary judge of the Court of Appeal or any judge of the Chancery Division to be appointed after the commencement of this Act, or any serjeant-at-law, or any of Her Majesty's counsel learned in the law, who, for the purposes of such commission, shall have all the power, authority, and jurisdiction of a judge of the said High Court.

Commissioners.

By s. 8 of the Act of 1875, *post*, p. 99, any judge of the Probate, Divorce, and Admiralty Division appointed after the passing of that Act will be bound to go circuit, and to take part in the London and Middlesex sittings for trials by jury.

By s. 15 of the Act of 1876, *post*, p. 134, the additional ordinary Judges of the Court of Appeal appointed under that Act are under an obligation to go circuit, and to act as commissioners under commissions of assize or other commissions issued in pursuance of the Act of 1873.

As to circuits, see s. 29, *ante*, p. 38; and as to the London and Middlesex sittings, s. 30, *ante*, p. 39; and notes to those sections. As to trials generally, see O. XXXVI., *post*, p. 317.

Sect. 38. Rota of

38. The judges to be placed on the rota for the trial of election petitions for England in each year, under the

provisions of the Parliamentary Elections Act, 1868, shall be selected out of the judges of the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court of Justice in such manner as may be provided by any Rules of Court to be made for that purpose; and in the meantime, and subject thereto, shall be selected out of the judges of the said Queen's Bench, Common Pleas, and Exchequer Divisions of the said High Court, by the judges of such divisions respectively, as if such divisions had been named instead of the Courts of Queen's Bench, Common Pleas, and Exchequer respectively, in such last-mentioned Act: Provided, that the judges who, at the commencement of this Act, shall be upon the rota for the trial of such petitions during the then current year, shall continue upon such rota until the end of such year, in the same manner as if this Act had not passed.

Act 1873, ss. 38, 39. election petitions.

This section has not been expressly repealed, but appears to be superseded by s. 13 of the Act of 1881, *post*, p. 166.

39. Any judge of the said High Court of Justice may, subject to any Rules of Court, exercise in court or in chambers all or any part of the jurisdiction by this Act vested in the said High Court, in all such causes and matters, and in all such proceedings in any causes or matters, as before the passing of this Act might have been heard in court or in chambers respectively, by a single judge of any of the courts whose jurisdiction is hereby transferred to the said High Court, or as may be directed or authorized to be so heard by any Rules of Court to be hereafter made. In all such cases, any judge sitting in court shall be deemed to constitute a court.

Sect. 39. Powers of one or more judges not constituting a Divisional Court.

By s. 16, *ante*, p. 9, all the jurisdiction of any of the courts enumerated in that section is transferred to the High Court, including (subject to the exceptions there referred to) all jurisdiction vested in, or capable of being exercised by, all or any one or more of the judges of such courts sitting in court or chambers, or elsewhere.

S. 39 and the following sections, modified by the Act 1876, s. 17, and the Rules made thereunder, provide for the modes in which the judges of the High Court may exercise the jurisdiction transferred.

Three modes are provided :—

I. By a judge in chambers.
II. By a judge in court.
III. By a divisional court.

I. As to chambers, by the above section any jurisdiction which could formerly have been exercised at chambers by a single judge of *any* court may be exercised by any judge.

Act 1873, ss. 39, 40.

In the many cases in the Act and Rules in which jurisdiction is given to the Court or a judge, the application should be to a judge at chambers where that is in accordance with the ordinary practice of the Division: see *passim*, *Clover* v. *Adams*, 6 Q. B. D. 622; see, also, *Baker* v. *Oakes*, 2 Q. B. D. 171, C. A.

As to appeals from chambers, see s. 50, *post*, p. 61; and as to practice at chambers, see O. LIV., *post*, p. 400.

II. With regard to the power of a single judge in court, by the above section all jurisdiction which might formerly have been exercised in court by a judge of *any* Court may be exercised by any judge. By s. 42, *post*, p. 53, actions in the Chancery, or in the Probate, Divorce, and Admiralty Division are to be heard, as heretofore, by a single judge in the first instance. By ss. 29 and 30, *ante*, pp. 38, 39, a commissioner of assize or a judge presiding at a trial by jury in London or Middlesex constitutes a Court: see *Hoch* v. *Boor*, 49 L. J. C. P. 665, C. A., where it was held that an appeal lay direct to the Court of Appeal from an order made by a judge at *nisi prius* referring the issues in an action to an official referee. And the Act of 1876, s. 17, *post*, p. 136, enacts, broadly, that every action and proceeding, and all business arising out of them, except as provided by Rules, must be disposed of before a single judge; and all proceedings after trial, down to and including final judgment (except, of course, proceedings on appeal), are to be taken before the judge who tried the action.

III. The constitution of divisional courts is now provided for by s. 17 of the Act of 1876, *post*, p. 136, and the holding of them for the various divisions by ss. 41, 43, 44 of the Act of 1873, *post*, pp. 53 to 55.

O. LVII. A., *post*, p. 415, determines what matters are to be disposed of by divisional courts. By s. 45, *post*, p. 55, appeals from inferior courts are to be heard by divisional courts.

Sect. 40. Divisional Courts of the High Court of Justice.

40. Such causes and matters as are not proper to be heard by a single judge shall be heard by Divisional Courts of the said High Court of Justice, which shall for that purpose exercise all or any part of the jurisdiction of the said High Court. Any number of such Divisional Courts may sit at the same time. A Divisional Court of the said High Court of Justice shall be constituted by two or three, and no more, of the judges thereof; and, except when through pressure of business or any other cause it may not conveniently be found practicable, shall be composed of three such judges. Every judge of the said High Court shall be qualified and empowered to sit in any of such Divisional Courts. The President of every such Divisional Court of the High Court of Justice shall be the senior judge of those present, according to the order of their precedence under this Act.

This section, so far as it is inconsistent with s. 17 of the Act of 1876, *post*, p. 136, is repealed by the latter section. The latter section, and O. LVII. A., made under it, *post*, p. 415, define what matters are to be heard by divisional courts. It provides that two judges, and no more, shall sit, unless there be special reason for having a larger number.

Sect. 41. Divisional Courts for business of Queen's Bench, Common Pleas, and Exchequer Divisions.

41. Subject to any Rules of Court, and in the meantime until such Rules shall be made, all business belonging to the Queen's Bench, Common Pleas, and Exchequer Divisions respectively of the said High Court, which, according to the practice now existing in the Superior Courts of Common Law, would have been proper to be transacted or disposed of by the Court sitting in Banc, if this Act had not passed, may be transacted and disposed of by Divisional Courts, which shall, as far as may be found practicable and convenient, include one or more judge or judges attached to the particular division of the said Court to which the cause or matter out of which such business arises has been assigned; and it shall be the duty of every judge of such last-mentioned division, and also of every other judge of the High Court who shall not for the time being be occupied in the transaction of any business specially assigned to him, or in the business of any other Divisional Court, to take part, if required, in the sittings of such Divisional Courts as may from time to time be necessary for the transaction of the business assigned to the said Queen's Bench, Common Pleas, and Exchequer Divisions respectively; and all such arrangements as may be necessary or proper for that purpose, or for constituting or holding any Divisional Courts of the said High Court of Justice for any other purpose authorized by this Act, and also for the proper transaction of that part of the business of the said Queen's Bench, Common Pleas, and Exchequer Divisions respectively, which ought to be transacted by one or more judges not sitting in a Divisional Court, shall be made from time to time under the direction and superintendence of the Judges of the said High Court; and in case of difference among them, in such manner as a majority of the said judges, with the concurrence of the Lord Chief Justice of England, shall determine.

This section, so far as it is inconsistent with s. 17 of the Act of 1876, *post*, p. 136, is repealed by the latter section. The latter section, and the rules made under it, *post*, p. 415, define what matters are to be taken before divisional courts.

Sect. 42. Distribution of business among the Judges of the Chancery and Probate, Divorce, and Admiralty

42. Subject to any Rules of Court, and in the meantime until such rules shall be made, all business arising out of any cause or matter assigned to the Chancery, or Probate, Divorce, and Admiralty Division of the said High Court shall be transacted and disposed of in the first instance by one judge only, as has been heretofore accustomed in the Court of Chancery, the Court of Pro-

Act 1873, ss. 42, 43.

Divisions of the High Court.

bate and for Divorce and Matrimonial Causes, and the High Court of Admiralty respectively; and every cause or matter which, at the commencement of this Act, may be depending in the Court of Chancery, the Court of Probate and for Divorce and Matrimonial Causes, and the High Court of Admiralty respectively, shall (subject to the power of transfer) be assigned to the same judge in or to whose court the same may have been depending or attached at the commencement of this Act; and every cause or matter which after the commencement of this Act may be commenced in the Chancery Division of the said High Court shall be assigned to one of the judges thereof, by marking the same with the name of such of the said judges as the plaintiff or petitioner (subject to the power of transfer) may in his option think fit: Provided that (subject to any Rules of Court, and to the power of transfer, and to the provisions of this Act as to trial of questions or issues by commissioners, or in Middlesex or London) all causes and matters which, if this Act had not passed, would have been within the exclusive cognizance of the High Court of Admiralty, shall be assigned to the present Judge of the said Admiralty Court during his continuance in office as a judge of the High Court.

S. 17 of the Act of 1876, *post*, p. 136, repeals this section so far as it is inconsistent with it; but there does not appear to be any such inconsistency.

As to marking the writ, see O. II., r. 1, *post*, p. 183, and note thereto.

As to transfer, see ss. 35 and 36, *ante*, pp. 49, 50; s. 11 of the Act of 1875, *post*, p. 104; and O. LI., rr. 1 to 3, *post*, pp. 388 to 393, and note thereto.

As to trials on circuit, and in London and Middlesex, see ss. 29 and 30, *ante*, pp. 38, 39; O. XXXVI., r. 29, *post*, p. 330.

As to County Court Appeals in Admiralty matters, see *The Two Brothers*, 1 P. D. 52; and s. 45, *post*, p. 55, and note thereto.

Sect. 43.

Divisional Courts for business of the Chancery Division.

43. Divisional Courts may be held for the transaction of any part of the business assigned to the said Chancery Division which the judge, to whom such business is assigned, with the concurrence of the President of the same division, deems proper to be heard by a Divisional Court.

This section, so far as it is inconsistent with s. 17 of the Act of 1876, is repealed by the latter section. The effect seems to be that nothing could be taken before a Divisional Court of the Chancery Division unless it fell within the list of matters enumerated in the R. S. C. Dec. 1876, r. 8, made under the Act of 1876; none of which seem to be matters likely to come before the Chancery Division.

Act 1873, ss. 44, 45.

Sect. 44. Divisional Courts for business belonging to the Probate, Divorce, and Admiralty Division.

44. Divisional Courts may be held for the transaction of any part of the business assigned to the Probate, Divorce, and Admiralty Division of the said High Court, which the judges of such division, with the concurrence of the President of the said High Court, deem proper to be heard by a Divisional Court. Any cause or matter assigned to the said Probate, Divorce, and Admiralty Division may be heard at the request of the President of such Division, with the concurrence of the President of the said High Court, by any other judge of the said High Court.

The jurisdiction of the Full Court of Divorce was not touched by the Act of 1873, but this anomaly has now been removed. By s. 9 of the Act of 1881, *post*, p. 165, Divorce appeals now go to the Court of Appeal.

Sect. 45. Appeals from Inferior Courts to be determined by Division Courts.

45. All appeals from Petty or Quarter Sessions, from a County Court, or from any other Inferior Court, which might before the passing of this Act have been brought to any Court or judge whose jurisdiction is by this Act transferred to the High Court of Justice, may be heard and determined by Divisional Courts of the said High Court of Justice, consisting respectively of such of the judges thereof as may from time to time be assigned for that purpose, pursuant to Rules of Court, or (subject to Rules of Court) as may be so assigned according to arrangements made for the purpose by the judges of the said High Court. The determination of such appeals respectively by such Divisional Courts shall be final unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court by which any such appeal from an inferior Court shall have been heard.

In pursuance of this section, r. 16 of the R. S. C. of Dec. 1875, provided for the constitution of a Divisional Court to hear these appeals.

By r. 11 of R. S. C. Dec., 1876 (O. LVIII., r. 19, *post*, p. 431), the rule of December, 1875, is repealed, and the following provision is substituted:

"Every judge of the High Court of Justice for the time being shall be a judge to hear and determine appeals from Inferior Courts, under section 45 of the Supreme Court of Judicature Act, 1873. All such appeals (except Admiralty appeals from Inferior Courts, which until further order shall be assigned as heretofore to the present Judge of the Admiralty Court) shall be entered in one list by the officers of the Crown Office of the Queen's Bench Division; and shall be heard by such Divisional Court of the Queen's Bench, Common Pleas, or Exchequer Division, as the Presidents of those Divisions shall from time to time direct. Nothing in this order shall affect the validity of any rule or regula-

Act 1873, s. 45.

tion heretofore issued with reference to such appeals by the Divisional Court formed under the said section."

Only one counsel will be heard on each side on an appeal from an Inferior Court: *Hawes* v. *Peake*, 24 W. R. 407. A motion to compel justices to state a case under 20 & 21 Vict. c. 43, must be made to the Queen's Bench Division and not to the Court instituted under this section: *Re Ellershaw*, 1 Q. B. D. 481.

As to time for entering the appeal where a rule has been obtained, see *Donovan* v. *Brown*, 4 Ex. D. 148.

By r. 8 of the Rules of December, 1876 (O. LVIIa. r. 1, *post*, p. 415), County Court appeals under s. 6 of the County Courts Act, 1875 (38 & 39 Vict. c. 50), will go to a Divisional Court, like other County Court appeals. County Court appeals in Admiralty matters are, it will be seen, expressly referred to the Judge of the Admiralty: see *The Two Brothers*, 1 P. D. 52. A case stated by Quarter Sessions under s. 269 of the Public Health Act, 1875, is subject to the provisions of this section, and no appeal lies from the Divisional Court without leave: *Reg.* v. *Swindon Local Board*, 49 L. J. Q. B. 522, C. A. And it seems that no appeal lies from the refusal of a Divisional Court to give leave to appeal: *The Amstel*, 2 P. D. 186, C. A.; but when the Queen's Bench Division in the exercise of its original common law jurisdiction affirms or quashes an order of sessions made subject to a special case an appeal lies as of right without leave: *The Queen* v. *Sarin*, 6 Q. B. D. 309, C. A.

In February, 1877, the following notice was issued: "1. It is ordered that motions under the 6th section of 38 & 39 Vict., c. 50, shall be made in the Queen's Bench, Common Pleas, or Exchequer Divisions, only upon the days appointed by these divisions, for hearing appeals from Superior Courts; and no such motion shall be made by way of appeal from any County Court unless a copy of the judge's notes, signed by the judge, shall have been handed to the proper officer in Court, unless otherwise ordered. 2. It is ordered that the party entering a special case, under Order LVIII., r. 19, at the Crown Office of the Queen's Bench Division, shall, four clear days before the day appointed for argument, deliver two copies of the case to the judges of the Divisional Court to which such cause has been assigned for argument, at the Judges' Chambers, in Rolls' Gardens, Chancery Lane, such copies to be marked "for the use of the judges in the Queen's Bench (Common Pleas or Exchequer) Division," and not with the name of any particular judge, and to be divided into paragraphs, and numbered as in the special case. Such copies are to be forwarded to the proper Divisions at Westminster."

County Court Appeals.

Under the Act above referred to (the County Courts Act, 1875), an appeal from the judgment of a County Court may be by motion within eight days for a rule nisi to reverse the judgment, to be made to a Divisional Court, or if it is not sitting to a judge at Chambers. See *Brown* v. *Shaw*, 1 Ex. D. 425. When the motion is made before a judge in Chambers, he has no power to adjourn the further hearing of it to the Divisional Court: *Button* v. *The Woolwich Building Society*, 5 Q. B. D. 88.

There is nothing in s. 6 of the County Courts Act, 1875, which takes away the power of the Appellate Court to order judgment to be entered in accordance with the power given by 13 & 14 Vict. c. 61, s. 14 (County Courts Act, 1850): *Whiteman* v. *Hawkins*, 4 C. P. D. 13.

S. 20 of the Appellate Jurisdiction Act, 1876, *post*, p. 138, does not prevent an appeal lying to the Court of Appeal where the

Act 1873, ss. 45, 46.

Divisional Court gives special leave under this section: *Crush* v. *Turner*, 3 Ex. D. 303, 38 L. T. 595, C. A. Where an action is remitted to the County Court, under s. 10 of the Act of 1867, no appeal lies from the Divisional Court to the Court of Appeal without special leave: *Bowles* v. *Drake*, 8 Q. B. D. 325, C. A.

If the judgment of the County Court judge be post-dated, the time for appealing given by s. 6 of the County Courts Act, 1875, is not thereby extended: *Wilberforce* v. *Sowton*, 39 L. T. 474; 48 L. J. C. P. 28.

As to extending the time for moving, see *Mason* v. *Wirral Highway Board*, 4 Q. B. D. 459, dissenting from *Tennant* v. *Rawlings*, 4 C. P. D. 133.

As regards the provision in s. 6 of the County Courts Act, 1875, that the judge on request shall take a note, it is not a condition precedent to the right of appeal that he should be requested to do so. When the judge, without being asked, had taken notes the Court of Appeal held that an appeal could be brought by motion on these notes, but declined to say what they would have held if the judge had not taken any note: *Seymour* v. *Coulson*, 49 L. J. Q. B. 604, C. A. However, in two cases the judges' notes have been dispensed with, see *Morgan* v. *Davies*, 39 L. T. 60, C. P. D.; *The Confidence*, 40 L. T. 201. As to the time at which the request to the County Court Judge to take a note must be made, see *Pierpoint* v. *Cartwright*, 5 C. P. D. 159; *Morgan* v. *Rees*, 6 Q. B. D. 89, affirmed by C. A. at p. 508.

It would seem that, upon a County Court Appeal, costs will ordinarily follow the event: *Leach* v. *South Eastern Ry. Co.*, 34 L. T. 134, App. I. C.

Mayor's Court.

An appeal from a judgment of the Mayor's Court, London, on a demurrer, lies not to the Divisional Court, but to the Court of Appeal: *Le Blanch* v. *Reuter's Telegraph Co.*, 1 Ex. D. 408; but when error on the record is not alleged, the appeal lies to the Divisional Court under this section: *Appleford* v. *Judkins*, 3 C. P. D. 489, C. A.

Sect. 46. Cases and points may be reserved for or directed to be argued before Divisional Courts.

46. Subject to any Rules of Court, any judge of the said High Court, sitting in the exercise of its jurisdiction elsewhere than in a Divisional Court, may reserve any case, or any point in a case, for the consideration of a Divisional Court, or may direct any case, or point in a case, to be argued before a Divisional Court; and any Divisional Court of the said High Court shall have power to hear and determine any such case or point so reserved or so directed to be argued.

The practice of reserving points at the trial for the opinion of the Court in banc was in constant use in the Common Law Courts; but it could only be done by consent. This section if it stood alone seemed to place it, in all cases, in the discretion of the judge. But s. 22 of the Act of 1875, *post*, p. 113, after reciting this section, enacted that nothing in the Acts or rules "shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the judge to the jury before whom the same shall come for trial with a proper and complete direction to the jury upon the law, and as to the evidence applicable to such issues: Provided also, that the said right may be enforced either by motion in the High Court of Justice, or by motion in the Court of Appeal, founded upon an exception entered upon or annexed to the record."

Act 1873, ss. 46, 47.

S. 46 is repealed by s. 17 of the Act of 1876, *post*, p. 136, so far as it is inconsistent with the latter section. The effect of that section and the rules made under it, *post*, p. 327, is that the power of a judge to reserve questions for a Divisional Court is taken away altogether. The judge may at the trial deal with every question of law that arises, and give judgment accordingly. And, under s. 22 of the Act of 1875, just cited, it would seem that he may be required to deal on the spot with all such questions of law as are necessary for the purpose of properly and completely directing the jury, if there be a jury. Or he may, instead of giving judgment at or after the trial, adjourn the case for further consideration, or leave any party to move for judgment: O. XXXVI., r. 22a, *post*, p. 327; in which case the further consideration must (except in certain cases provided for by R. S. C., Dec. 1876, r. 9, *post*, p. 415 (O. LVIIa., r. 2), be had, or the motion for judgment made, before the same judge before whom the trial takes place: s. 17 of the Act of 1876, *post*, p. 136; O. LVIIa., *post*, p. 415.

If the judgment of the judge, whether given at the trial or afterwards, is wrong by reason of his misapplying the law to the facts, the remedy is by an appeal to the Court of Appeal: s. 19, *ante*, p. 13; O. XL., r. 4a, *post*, p. 356.

The only purpose for which it is necessary or allowable to go to the Divisional Court is for a new trial in cases where the action has been tried by a jury: s. 17 of the Act of 1876, *post*, p. 136; O. LVIIa., *post*, p. 415; O. XXXIX. r. 1a, *post*, p. 350. If the trial takes place before a judge without a jury, an application for a new trial, whatever the ground, must be made to the Court of Appeal: *Ibid.*; *Oastler* v. *Henderson*, 2 Q. B. D. 575, C. A.

Sect. 47.

Provision for Crown cases reserved.

47. The jurisdiction and authorities in relation to questions of law arising in criminal trials which are now vested in the Justices of either Bench and the Barons of the Exchequer by the Act of the session of the eleventh and twelfth years of the reign of her present Majesty, chapter seventy-eight, intituled "An Act for the further amendment of the administration of the Criminal Law," or any Act amending the same, shall and may be exercised after the commencement of this Act by the judges of the High Court of Justice, or five of them at the least, of whom the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, or one of such chiefs at least, shall be part. The determination of any such question by the judges of the said High Court in manner aforesaid shall be final and without appeal; and no

Appeal in criminal matters.

appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said judges under the said Act of the eleventh and twelfth years of her Majesty's reign.

By s. 71 of the Act of 1873, for which s. 19 of the Act of 1875

is now substituted, criminal procedure remains as it has been, unless and until altered by rule. Act 1873, ss. 47, 48.

The earlier part of this section deals only with the Court for Crown Cases Reserved. But the latter words precluding any appeal from a judgment of the High Court in any criminal matter (except as mentioned) are general in their application. Accordingly, it has been held that no appeal lies from a judgment of the Queen's Bench Division discharging an order to review taxation of costs on a criminal information for libel: *Reg.* v. *Steel*, 2 Q. B. D. 37, C. A. Nor from a judgment of the same Court discharging a rule for a certiorari to bring up and quash a summary conviction for trespassing in pursuit of game: *Reg.* v. *Fletcher*, 2 Q. B. D. 43, C. A. Nor from a judgment of the Court of Appeal from Inferior Courts (s. 45, *ante*, p. 55), upon a case stated by justices quashing a conviction for keeping a common gaming house: *Blake* v. *Beech*, 2 Ex. D. 335, C. A. Nor from a judgment of the Queen's Bench Division upon a case stated by justices as to an information for contravening the by-laws of a school under the Elementary Education Act, 1874: *Mellor* v. *Denham*, 5 Q. B. D. 467, C. A. Nor from an order of the Queen's Bench Division, quashing an order of justices under s. 92 of the Public Health Act, 1875, as to abating nuisances: *The Queen* v. *Whitchurch*, 7 Q. B. D. 534, C. A.

By O. LXII., *post*, p. 443, criminal matters are excepted from the operation of the Rules of Court; therefore, where in a criminal case there is error on the record, the matter is brought before the Court of Appeal by writ of error according to the old practice. See *e. g. Bradlaugh* v. *The Queen*, 3 Q. B. D. 607, C. A. See too s. 19 of the Act of 1875, *post*, p. 111. By O. LXII. r. 6, Mandamus, Quo Warranto and Prohibition, are to be deemed civil proceedings for the purposes of that Order, and by r. 2 of the same Order the provisions of O. LVIII. as to appeals are applied to civil proceedings on the Crown side of the Queen's Bench Division, and all proceedings on the Revenue side of the Exchequer Division. It is to be observed that, although Quo Warranto is in the nature of a criminal proceeding (see *R.* v. *Seeley*, 5 E. & B. 1, Ex. Ch.), and before the Rules of April, 1880, which extended to it the provisions of O. LVIII., a Quo Warranto information was tried without a jury, and an appeal brought from the judgment of the Queen's Bench Division as if it were an ordinary civil action. See *R.* v. *Collins*, 2 Q. B. D. 30, C. A. In *The Queen* v. *Holl*, 7 Q. B. D. 578, C. A. it was held that an appeal lay from an order of the Queen's Bench Division, discharging a rule for a mandamus to Election Commissioners to grant a certificate to a witness.

In so far as this section relates to the quorum of the Court for Crown Cases Reserved, it is amended by s. 15 of the Act of 1881, *post*, p. 168, which provides that the jurisdiction given thereby may be exercised by any five or more of the Judges of the High Court, of whom the Lord Chief Justice must be one unless he is prevented by illness or otherwise, in which case there must be a written certificate to that effect.

48. [*Motions for new trials to be heard by Divisional Courts.*] Sect. 48

This section is repealed by s. 33 of the Act of 1875, *post*, pp. 125, 127. As to the existing practice with reference to new trials, see O. XXXIX., *post*, p. 350.

Act 1873, s. 49.

Sect. 49. What orders shall not be subject to Appeal.

49. No order made by the High Court of Justice or any judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or judge making such order.

As to appeals generally, see s. 19, *ante*, p. 13; O. LVIII., *post*, p. 417.

Costs.

Where a judge decided that a defendant had committed a breach of an injunction, and, no committal being pressed for on the other side, simply ordered the defendant to pay the costs, it was held that the order was not one as to costs only in the discretion of the Court, within the meaning of this section, and that an appeal lay: *Witt* v. *Corcoran*, 2 Ch. D. 69, C. A. And where an order was made giving a trustee his costs, charges, and expenses out of a fund in Court, it was held that this order was not within the section, and that an appeal lay: *Re Chennell*, 8 Ch. D. 492, C. A. See too *Hill* v. *Metropolitan Asylums Board*, 5 App. Cas. 582, H.L. In that case the Divisional Court made an order for a new trial on the application of the defendants. The Court of Appeal varied the order by granting a new trial only on the condition that the defendants should within two months pay the costs of the first trial. The defendants appealed to the House of Lords, who held that this was not an appeal as to costs only, and that the appeal would lie. See further *Marsden* v. *Lancashire Railway Co.*, 29 W. R. 580, C. A., and *Willmott* v. *Barber*, 17 Ch. D. 772, C. A. It is doubtful whether an appeal lies from the order of a judge made at the trial of a jury case depriving a successful party of his costs, see *Collins* v. *Welch*, 5 C. P. D. 27, at p. 33, per Brett, L. J. If there be an appeal it lies to the Court of Appeal: *Marsden* v. *Lancashire and Yorkshire Railway Co.*, 7 Q. B. D. 641, C. A. On the other hand, where a judge, being asked to commit for contempt, refused to do so and made the costs, costs in the cause, it was held that no appeal lay: *Ashworth* v. *Outram*, 5 Ch. D. 943, C. A. An action, in which an interlocutory injunction had been granted, was dismissed without costs, and both parties appealed. The defendant appealed on the ground that the action ought to have been dismissed with costs, and that an inquiry as to damages ought to have been granted. By reason of the cross-appeals the whole case was heard. The Court of Appeal varied the judgment of the Court below by directing an inquiry as to damages, but held that they had no power to vary the order as to costs: *Graham* v. *Campbell*, 7 Ch. D. 490, C. A. See further *Harris* v. *Aaron*, 4 Ch. D. 749, C. A.; *Re Hoskin's Trust*, 6 Ch. D. 281, C. A. *Hartmont* v. *Foster*, 8 Q. B. D. 82, C. A. interpleader; *Hornby* v. *Cardwell*, 8 Q. B. D. 329, C. A. third party costs. In other cases, where the decision has been upon a question of principle, not of discretion, though it has affected costs, an appeal has been held to lie: see *Re Clements*, 46 L. J. Ch. 375, C. A.; *Re Rio Grande Co.*, 5 Ch. D. 282, C. A.; *The City of Manchester*, 5 P. D. 221, C. A. This section does not apply to an order made by a district registrar or master; *Foster* v. *Edwards*, 48 L. J. 767. Nor to an order as to the costs of an executor who has commenced an administration section: *Farrow* v. *Austin*, 18 Ch. D. 58, C. A.

Consent orders

In *Eade* v. *Winsor*, W. N. 1878, p. 88, the Exchequer Division held that where an interpleader issue was by consent tried by a judge at Chambers, the order made by him came within this section and was not appealable. See, also, *Bustros* v. *White*, 1 Q. B. D. 423, C. A. as to discovery by consent. As to undertakings

not to appeal, see note to s. 19, *supra*, p. 13. Where parties have consented to an order the consent may be retracted at any time before the order is drawn up: *Rogers* v. *Horn*, 26 W. R. 432; and see *Att.-Gen.* v. *Tomline*, 7 Ch. D. 388, at 389. See by way of analogy the remarks of Jessel, M. R., as to the power of a judge to re-consider an order before it is finally drawn up: *Re St. Nazaire Co.*, 12 Ch. D. at 91, C. A. See also some remarks in an opposite sense by Fry, J., as to the withdrawal of a compromise: *Davis* v. *Davis*, 13 Ch. D. 861.

Sect. 50. As to discharging orders made in Chambers

50. Every order made by a judge of the said High Court in Chambers, except orders made in the exercise of such discretion as aforesaid, may be set aside or discharged upon notice by any Divisional Court, or by the judge sitting in court, according to the course and practice of the Division of the High Court to which the particular cause or matter in which such order is made may be assigned; and no appeal shall lie from any such order, to set aside or discharge which no such motion has been made, unless by special leave of the judge by whom such order was made, or of the Court of Appeal.

As to a judge's jurisdiction in chambers, see s. 39, *ante*, p. 51, and note thereto. As to the practice in chambers, see O. LIV., *post*, p. 400.

In the Chancery Division, where a question has been argued before the judge himself in chambers, an appeal may be made direct to the Court of Appeal, without leave: *Murr* v. *Cooke*, 24 W. R. 756; W. N. 1876, p. 193, V.-C. H.; *Northampton Coal Co.* v. *Midland Waggon Co.*, 7 Ch. D. 500, C. A. But in the absence of special circumstances, a certificate from the judge that he does not desire to hear further argument must be obtained: *Thomas* v. *Elsom*, 6 Ch. D. 347, C. A.; *Re Marsh*, W. N. 1877, p. 205, C. A. See also *The Vicar*, 2 P. D. 29, C. A., and *Holloway* v. *Cheston*, 19 Ch. D. 516. Where a motion has been made in Court to a judge of the Chancery Division to discharge an order made by him in chambers, and he refuses the application, an appeal may be brought within twenty-one days to the Court of Appeal. As regards the time for making such motion to the Judge in Court, O. LVIII., r. 15, does not apply, but by analogy the practice of the Chancery Division is that no such motion shall be made without special leave after twenty-one days: *Dickson* v. *Harrison*, 9 Ch. D. 243, C. A.; *Heatly* v. *Newton*, 19 Ch. D. 326, C. A.

As to appeals from decisions at Chambers in interpleader, see note to O. I., r. 2, *post*, p. 176.

Sect. 51. Provision for absence or vacancy in the office of a judge.

51. Upon the request of the Lord Chancellor, it shall be lawful for any judge of the Court of Appeal, who may consent so to do, to sit and act as a Judge of the said High Court or to perform any other official or ministerial acts for or on behalf of any judge absent from illness or any other cause, or in the place of any judge whose office has become vacant, or as an additional judge of any division; and while so sitting and acting any such judge of the Court of Appeal shall have all the

Act 1873, ss. 51—54.

power and authority of a judge of the said High Court.

This section applies to a case where an interim injunction is urgently required, and the judge before whom the action is pending has risen for a few days' vacation during the regular sittings: *Chapman* v. *Real Property Trust*, 7 Ch. D. 732, M. R. The power given by this section is now supplemented by s. 12 of the Act of 1881, *post*, p. 166, which enables any judge, who may consent to do so, to sit for another and dispose of any interlocutory application or matter without any request from the Lord Chancellor.

Sect. 52. Power of a single judge in Court of Appeal.

52. In any cause or matter pending before the Court of Appeal, any direction incidental thereto, not involving the decision of the appeal, may be given by a single judge of the Court of Appeal; and a single judge of the Court of Appeal may at any time during vacation make an interim order to prevent prejudice to the claims of any parties pending an appeal as he may think fit; but every such order made by a single judge may be discharged or varied by the Court of Appeal or a Divisional Court thereof.

With respect to the constitution of the Court of Appeal, see s. 4 of the Act of 1875, *post*, p. 96; and s. 16 of the Act of 1876, *post*, p. 136.

As to when an appeal lies, see s. 19, *ante*, p. 13, and note thereto.

For the practice upon appeal, see O. LVIII., *post*, p. 417.

As to vacations, see s. 28, *ante*, p. 38, and O. LXI., rr. 5 to 7, *post*, pp. 437 to 442.

Sect. 53.

53. [*Divisional Courts of Court of Appeal.*]

This section is repealed by s. 33 of the Act of 1875, *post*, pp. 125, 127, and the following provision is substituted:

Sittings of Court of Appeal.

S. 12. "Every appeal to the Court of Appeal shall, where the subject matter of the appeal is a final order, decree, or judgment, be heard before not less than three judges of the said Court sitting together, and shall, when the subject-matter of the appeal is an interlocutory order, decree, or judgment, be heard before not less than two judges of the said Court sitting together.

"Any doubt which may arise as to what decrees, orders, or judgments are final, and what are interlocutory, shall be determined by the Court of Appeal.

"Subject to the provisions contained in this section the Court of Appeal may sit in two divisions at the same time."

See as to this, O. LVIII., r. 2, *post*, p. 418, and note thereto.

Sect. 54.

54. [*Judges not to sit on appeal from their own judgments.*]

This section is repealed by s. 4 of the Act of 1875, *post*, p. 97, which is amended and explained by s. 11 of the Act of 1881, *post*, p. 166.

55. [*Arrangements for business of Court of Appeal, and for hearing Appeals transferred from the Judicial Committee of the Privy Council.*] Act 1873, ss. 55—57.

Sect. 55.

By s. 2 of the Act of 1875, *post*, p. 95, the operation of this section, as well as that of ss. 20 and 21, was suspended until the 1st November, 1876; and by s. 24 of the Act of 1876, *post*, p. 140, the three sections are repealed.

PART IV.

TRIAL AND PROCEDURE.

56. Subject to any Rules of Court and to such right as may now exist to have particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice or before the Court of Appeal, may be referred by the Court or by any Divisional Court or judge before whom such cause or matter may be pending, for inquiry and report to any official or special referee, and the report of any such referee may be adopted wholly or partially by the Court, and may (if so adopted) be enforced as a judgment by the Court. The High Court or the Court of Appeal may also, in any such cause or matter as aforesaid in which it may think it expedient so to do, call in the aid of one or more assessors specially qualified, and try and hear such cause or matter wholly or partially with the assistance of such assessors. The remuneration, if any, to be paid to such special referees or assessors shall be determined by the Court.

Sect. 56. References for inquiry and report, and assessors.

See note to the next section. By R. S. C., April, 1880, a form of the order of reference under this section for inquiry and report is given: see App. H. 31, *post*, p. 591: see also *Broder* v. *Saillard*, 2 Ch. D. at 694, M. R., for a form of order referring to an architect for report on the question whether certain stables constituted a nuisance.

57. In any cause or matter (other than a criminal proceeding by the Crown) before the said High Court in which all parties interested who are under no disability consent thereto, and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the Court

Sect. 57. Power to direct trial of issues before Referees.

Act 1873, ss. 57, 58.

or a judge, conveniently be made before a jury, or conducted by the Court through its other ordinary officers, the Court or a judge may at any time, on such terms as may be thought proper, order any question or issue of fact or any question of account arising therein to be tried either before an official referee, to be appointed as hereinafter provided, or before a special referee to be agreed on between the parties; and any such special referee so agreed on shall have the same powers and duties and proceed in the same manner as an official referee. All such trials before referees shall be conducted in such manner as may be prescribed by Rules of Court, and subject thereto in such manner as the Court or judge ordering the same shall direct.

Reference.

This section and the preceding one introduce two new kinds of reference. By s. 56 questions may be referred for inquiry and report. By s. 57 issues may be referred for trial. Under neither section can an action be referred, but only the questions or issues of fact arising therein: *Longman* v. *East*, 3 C. P. D. 142, C. A.; *Braginton* v. *Yates*, W. N. 1880, p. 150, M. R. The form of judgment given by R. S. C., 1875, in App. D. 6, *post*, p. 543, is therefore misleading: see a correct form App. D. 6 A.: see a form of order of reference under s. 57 given by R. S. C. April, 1880, App. H., No. 32, *post*, p. 591. As regards the compulsory powers given by s. 57, it has been held that any question which might be referred to a master under s. 3 of the C. L. P. Act, 1854, may also be referred compulsorily to an official referee: *Ward* v. *Pilley*, 5 Q. B. D. 427, C. A. In that case the action was brought on a builder's bill. The defendant denied his liability, and counter-claimed for breach of an agreement by the plaintiff to supply him with funds to meet a certain acceptance. For other cases where the exercise of compulsory powers has been discussed, see *Rowcliffe* v. *Leigh*, 3 Ch. D. 292; *Leigh* v. *Brooks*, 5 Ch. D. 592, C. A.; *Hoch* v. *Boor*, 49 L. J. C. P., C. A. In any case in which there is power to refer compulsorily a question of account there is also power to refer at the same time all the other issues in the action: *Ward* v. *Pilley*, 5 Q. B. D. 427, C. A.: see at 429, where apparently *Clow* v. *Harper*, 3 Ex. D., 198, C. A., is the case dissented from.

With respect to references to referees generally, their powers, the modes of procedure before them, and the remedy by way of appeal from them, see O. XXXVI., rr. 30 to 34, *post*, pp. 331 to 341, and note thereto, where the subject is fully considered.

As to the appointment of Official Referees, see s. 83, *post*, p. 82.

Sect. 58. Power of Referees and effect of their findings.

58. In all cases of any reference to or trial by referees under this Act the referees shall be deemed to be officers of the Court, and shall have such authority for the purpose of such reference or trial as shall be prescribed by Rules of Court or (subject to such rules) by the Court or judge ordering such reference or trial; and the report of any referee upon any question of fact on any such trial

shall (unless set aside by the Court) be equivalent to the verdict of a jury. **Act 1873, ss. 59, 60.**

See note to the last section, and *Sullivan* v. *Rivington*, 28 W. R. 372.

59. With respect to all such proceedings before referees and their reports, the Court or such judge as aforesaid shall have, in addition to any other powers, the same or the like powers as are given to any Court whose jurisdiction is hereby transferred to the said High Court with respect to references to arbitration and proceedings before arbitrators and their awards respectively, by the Common Law Procedure Act, 1854. **Sect. 59. Powers of Court with respect to proceedings before Referees.**

See note to s. 57. The sections of the C. L. P. Act, 1854, relating to arbitration, will be found set out in the note to O. XXXVI., r. 30, *post*, p. 334.

60. And whereas it is expedient to facilitate the prosecution in country districts of such proceedings as may be more speedily, cheaply, and conveniently carried on therein; it shall be lawful for Her Majesty, by Order in Council, from time to time to direct that there shall be District Registrars in such places as shall be in such order mentioned for districts to be thereby defined, from which writs of summons for the commencement of actions in the High Court of Justice may be issued, and in which such proceedings may be taken and recorded as are hereinafter mentioned; and Her Majesty may thereby appoint that any Registrar of any County Court, or any Registrar or Prothonotary or District Prothonotary of any local Court whose jurisdiction is hereby transferred to the said High Court of Justice, or from which an appeal is hereby given to the said Court of Appeal, or any person who, having been a District Registrar of the Court of Probate, or of the Admiralty Court, shall under this Act become and be a District Registrar of the said High Court of Justice, or who shall hereafter be appointed such District Registrar, shall and may be a District Registrar of the said High Court for the purpose of issuing such writs as aforesaid, and having such proceedings taken before him as are hereinafter mentioned. This section shall come into operation immediately upon the passing of this Act. **Sect. 60. Her Majesty may establish District Registries in the country for the Supreme Court.**

This section is amended by s. 13 of the Act of 1875, *post*, p. 107; which is as follows:

S. 13. "Whereas by s. 60 of the principal Act it is provided that for the purpose of facilitating the prosecution in country districts of legal proceedings, it shall be lawful for her Majesty, by Order **Amendment of s. 60 of 36 & 37 Vict. c. 66, as to**

Act 1873, ss. 60—63.

in Council, from time to time to direct that there shall be District Registrars in such places as shall be in such order mentioned for districts to be thereby defined; and whereas it is expedient to amend the said section, Be it therefore enacted that—

District Registrars.

"Where any such order has been made, two persons may, if required, be appointed to perform the duties of District Registrar in any district named in the Order, and such persons shall be deemed to be joint District Registrars, and shall perform the said duties in such manner as may from time to time be directed by the said Order, or any Order in Council amending the same.

"Moreover the registrar of any inferior court of record having jurisdiction in any part of any district defined by such Order (other than a county court) shall, if appointed by her Majesty, be qualified to be a District Registrar for the said district, or for any and such part thereof as may be directed by such Order or any Order amending the same.

"Every District Registrar shall be deemed to be an officer of the Supreme Court, and be subject accordingly to the jurisdiction of such Court, and of the divisions thereof."

An Order in Council has been made in pursuance of this section, establishing a number of District Registries and defining their districts. See the Order, *post*, p. 687.

By s. 22 of the Act of 1876, *post*, p. 139, District Registrars are given power to appoint Deputies.

S. 22 of the Act of 1881, *post*, p. 170, enables solicitors of five years' standing, under certain conditions, to be appointed District Registrars.

The same section prohibits District Registrars from practising in their own registries.

Sect. 61. Seals of District Registries.

61. In every such District Registry such seal shall be used as the Lord Chancellor shall from time to time, either before or after the time fixed for the commencement of this Act, direct, which seal shall be impressed on every writ and other document issued out of or filed in such District Registry, and all such writs and documents, and all exemplifications and copies thereof, purporting to be sealed with the seal of any such District Registry, shall in all parts of the United Kingdom be received in evidence without further proof thereof.

Sect. 62. Powers of District Registrars.

62. All such District Registrars shall have power to administer oaths and perform such other duties in respect of any proceedings pending in the said High Court of Justice or in the said Court of Appeal as may be assigned to them from time to time by Rules of Court, or by any special order of the Court.

As to the powers of District Registrars, see O. XXXV., *post*, p. 312.

Sect. 63.

63. [*Fees to be taken by District Registrars.*]

This section is repealed by s. 33 of the Act of 1875, *post*, pp.

125, 127; and the provisions of s. 26 of that Act are substituted for it. See *post*, p. 116. **Act 1873, ss. 63—65.**

64. Subject to the Rules of Court, in force for the time being, writs of summons for the commencement of actions in the High Court of Justice shall be issued by the District Registrars when thereunto required; and unless any order to the contrary shall be made by the High Court of Justice, or by any judge thereof, all such further proceedings, including proceedings for the arrest or detention of a ship, her tackle, apparel, furniture, cargo, or freight, as may and ought to be taken by the respective parties to such action in the said High Court down to and including entry for trial, or (if the plaintiff is entitled to sign final judgment or to obtain an order for an account by reason of the non-appearance of the defendant) down to and including final judgment, or an order for an account, may be taken before a District Registrar, and recorded in the District Registry, in such manner as may be prescribed by Rules of Court; and all such other proceedings in any such action as may be prescribed by Rules of Court shall be taken and if necessary may be recorded in the same District Registry. **Sect. 64. Proceedings to be taken in District Registries.**

As to proceedings in District Registries generally see O. V., r. 1; O. XII., rr. 1 to 5; O. XXXV.; O. LIV., r. 2a; *post*, pp. 196, 210, 211, 308, and notes thereto.

65. Any party to an action in which a writ of summons shall have been issued from any such District Registry shall be at liberty at any time to apply, in such manner as shall be prescribed by Rules of Court, to the said High Court, or to a judge in chambers of the division of the said High Court to which the action may be assigned, to remove the proceedings from such District Registry into the proper office of the said High Court; and the Court or judge may, if it be thought fit, grant such application, and in such case the proceedings and such original documents, if any, as may be filed therein shall upon receipt of such order be transmitted by the District Registrar to the proper office of the said High Court, and the said action shall thenceforth proceed in the said High Court in the same manner as if it had been originally commenced by a writ of summons issued out of the proper office in London; or the Court or judge, if it be thought right, may thereupon direct that the proceedings may continue to be taken in such District Registry. **Sect. 65. Power for Court to remove proceedings from District Registries.**

As to removal from the District Registry, and also as to removal

Act 1873, ss. 65—67.

from London to a District Registry, see O. XXXV., rr. 11 to 14, *post*, pp. 314, 315, and note thereto.

Sect. 66. Accounts and inquiries may be referred to District Registrars.

66. It shall be lawful for the Court, or any judge of the division to which any cause or matter pending in the said High Court is assigned, if it shall be thought fit, to order that any books or documents may be produced, or any accounts taken or inquiries made, in the office of or by any such District Registrar as aforesaid; and in any such case the District Registrar shall proceed to carry all such directions into effect in the manner prescribed; and in any case in which any such accounts or inquiries shall have been directed to be taken or made by any District Registrar, the report in writing of such District Registrar as to the result of such accounts or inquiries may be acted upon by the Court as to the Court shall seem fit.

As to the production of documents, see O. XXXI., *post*, p. 290, and note thereto.

As to inquiries and accounts, see O. XXXIII., *post*, p. 305, and *Re Bowen*, W. N. 1882, p. 44.

Sect. 67. 30 & 31 Vict. c. 142, ss. 5, 7, 8, and 10, to extend to actions in High Court.

67. The provisions contained in the fifth, seventh, eighth, and tenth sections of the County Courts Act, 1867, shall apply to all actions commenced or pending in the said High Court of Justice in which any relief is sought which can be given in a County Court.

By the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5:

Costs not recoverable in Superior Courts where less than £20 on contract or £10 on tort.

"If in any action *commenced after the passing of this Act* in any of her Majesty's Superior Courts of Record the plaintiff shall recover a sum not exceeding twenty pounds if the action is founded on contract, or ten pounds if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such Superior Court, or unless the Court or a judge at chambers shall by rule or order allow such costs."

Order LV., r. 1, *post*, p. 405, contains the general rule as to costs:—

"Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity: Provided that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shown, the judge before whom such action or issue is tried or the Court shall otherwise order."

The effect of O. LV., read by the light of the 67th section, is to supersede all previous statutes which gave or denied costs to the successful party in an action, with the exception of so much of

the provisions of the County Courts Act, 1867, as are expressly saved by that section: *Garnett* v. *Bradley*, 3 App. Cas. 944, H. L.; *Ex parte Mercers' Co.*, 10 Ch. D. 481, C. A. As to proceedings other than actions see note to O. LV., *post*, p. 406. The 67th section makes no reference to the County Courts (Admiralty) Act, 1868 (31 & 32 Vict. c. 71); therefore the provisions of s. 9 of that Act as to costs are now superseded by O. LV.: *Tennant* v. *Ellis*, 6 Q. B. D. 46. **Act 1873, s. 67.**

Before the Judicature Acts, it was held the provisions of s. 5 of the County Courts Act, 1867, applied to "any action" in the widest sense; that is to say to actions which could not, as well as to actions which could, be brought in a County Court: *Sampson* v. *Mackay*, L. R. 4 Q. B. 643. But now by the terms of the 67th section its operation is confined to actions in which the relief sought could be given by a County Court: see *Parsons* v. *Tinling*, 2 C. P. D. 119, action for libel; *Garnett* v. *Bradley*, 3 App. Cas. 944, H. L., action for slander.

It was also held that the words "commenced after the passing of this Act" in the 5th section were to be treated as parenthetical, and that the section applied to all actions in the Superior Court whether commenced there or not, as, for instance, to the case of an action commenced in the Mayor's Court and removed by certiorari into the Queen's Bench: *Pellas* v. *Breslauer*, L. R. 6 Q. B. 438; see too *Flitters* v. *Allfrey*, 10 L. R. C. P. 29. This construction would still hold good as regards cases removed from a County Court into the High Court; but, having regard to the authorities cited above, it seems clear that the 5th section no longer applies to an action removed from any other Inferior Court into the High Court, unless it be of such a nature that it could have been brought in a County Court.

With regard to the case of a defendant added after action brought, see *Balmain* v. *Lickfold*, L. R. 10 C. P. 203.

As to what are actions founded on contract, and what on tort, within the meaning of this section, see *Legge* v. *Tucker*, 1 H. & N. 500; *Baylis* v. *Lintott*, L. R. 8 C. P. 345. An action against a carrier for misdelivery of goods after notice is founded on tort: *Pontifex* v. *Midland Ry Co.*, 3 Q. B. D. 23. An action against a common carrier for loss of goods is founded on contract: *Fleming* v. *Manchester Railway Co.*, 4 Q. B. D. 81, C. A. Detinue is an action founded on tort, *Bryant* v. *Herbert*, 3 C. P. D., 389, C. A. Where an action founded on tort was referred, a term of the reference being "costs of the action to abide the event," and the arbitrator found for the plaintiff, damages £10, it was held that the plaintiff was not entitled to costs: *Rutherford* v. *Wilkie*, 41 L. T. 435. Contract or tort.

The word "recover" applies to cases in which the action is referred either compulsorily or by agreement, and the plaintiff obtains judgment for less than the specified amount: *Cowell* v. *Amman Company*, 6 B. & S. 333; *Robertson* v. *Sterne*, 13 C. B. N. S. 248; *Smith* v. *Edge*, 2 H. & C. 659; *Fergusson* v. *Davison*, 8 Q. B. D. 470, C. A.; but in the case of a reference by consent, the parties may contract themselves out of the statute: see *Gallatti* v. *Wakefield*, 4 Ex. D. 249, C. A., where upon a reference by consent upon the terms that the costs of the cause should abide the event, and the costs of the reference and award should be in the discretion of the arbitrator, and the arbitrator awarded the plaintiff less than the specified amount, but directed the defendant to pay the costs of the reference and award; it was held that he had "Recover."

Act 1873, s. 67.

power to make this order, and that the statute did not deprive the plaintiff of the costs so awarded. So, too, the word "recover" applies where money less than the specified sum is paid into court and accepted in satisfaction, *Parr* v. *Lillicrap*, 1 H. & C. 615; *Boulding* v. *Tyler*, 3 B. & S. 472. The same rule also applies when the plaintiff's claim is within the limits of the County Court jurisdiction, and has been reduced below the specified sum by set-off: *Ashcroft* v. *Foulkes*, 18 C. B. 261; *Beard* v. *Perry*, 2 B. & S. 493; *Stooke* v. *Taylor*, 5 Q. B. D. 569; *Baines* v. *Bromley*, 6 Ex. D. 691, C. A.; see at p. 694 per Brett, L. J.; though where the plaintiff's claim exceeds the limits of the County Court jurisdiction, but is reduced below the specified sum by set-off, it seems the rule does not apply: *Walesby* v. *Grulston*, L. R. 1 C. P. 567; *Neale* v. *Clarke*, 4 Ex. D. 286. A counter-claim, however, is different from a set-off, for it is in the nature of a cross action: see per Brett, L. J., in *Winterfield* v. *Bradnum*, 3 Q. B. D. 326, and *Baines* v. *Bromley*, 6 Ex. D. 694; and therefore, where the plaintiff's claim has been reduced below the specified sum by damages on the defendant's counter-claim, the amount "recovered" is the amount for which the plaintiff would have been entitled to judgment, if there had been no counter-claim: *Stoke* v. *Taylor*, 5 Q. B. D. 569; see too *Halliman* v. *Price*, 27 W. R. 490. This follows from the rule that the term "event" in O. LV. must be read distributively: *Cole, Marchant, & Co.* v. *Firth*, 4 Ex. D. 301; *Berdan* v. *Greenwood*, 3 Ex. D. at 257; *Myers* v. *Defries*, 5 Ex. D. 15, affirmed by C. A. p. 180; *Baines* v. *Bromley*, 6 Ex. D. 691, C. A.; *Ellis* v. *De Silva*, 6 Q. B. D. 521, C. A.; which are inconsistent with *Staples* v. *Young*, 2 Ex. D. 324.

A plaintiff, by merely claiming an amount beyond the limit of the County Court jurisdiction, cannot exclude the operation of this section. If he obtains judgment for less than the specified sum the provisions of the Act apply: *Chatfield* v. *Sidgwick*, 4 C. P. D. 459, C. A.

This section does not apply to the amount recovered by a defendant on his counter-claim: *Blake* v. *Appleyard*, 3 Ex. D. 195; see too *Chatfield* v. *Sidgwick*, 4 C. P. D. 459, C. A.

When an action is brought for more than £50, and the defendant applies under s. 7 of the County Courts Act, 1867, to hear it tried in the County Court, the judge has no power to dismiss the application on the terms that if the plaintiff recovers only £50 he shall only be entitled to County Court costs: *Insley* v. *Jones*, 4 Ex. D. 16.

Certificate.

Two modes, it will be observed, are provided, in which, in cases within the section, a plaintiff may get his costs. The first is a certificate of the judge that there was sufficient ground for bringing the action in the Superior Court. The word judge includes the judge of a County Court to which the case is sent for trial: *Taylor* v. *Cass*, L. R. 4 C. P. 614; and an under-sheriff executing a writ of inquiry: *Craven* v. *Smith*, L. R. 4 Ex. 146. The certificate is to be upon the record. This has hitherto in ordinary cases been the Nisi Prius record. Probably the record for this purpose will ordinarily be, for the future, the copy of the pleadings delivered by the party entering the cause for trial under O. XXXVI., r. 17, *post*, p. 324. At Nisi Prius the Associate will make an entry of such certificate, under O. XXXVI., r. 23, *post*, p. 328. And his certificate, it may be presumed, will be the proper evidence of it. See *Ibid*, rr. 24 and 25, *post*, p. 329. In the case of a County Court Judge the issue sent to the County Court, and in the case of an under-sheriff the writ of inquiry, is a sufficient record upon

which to certify: *Taylor* v. *Cass*, *ubi suprà*. The certificate need not be given during the assizes at which the cause is tried: *Bennett* v. *Thompson*, 6 E. & B. 683. A master to whom an action is referred with the powers of a judge may certify, but only in his award: *Bedwell* v. *Wood*, 2 Q. B. D. 626. Act 1873, s. 67.

Secondly, the plaintiff may apply to the Court, or to a judge at chambers, for a rule or order allowing his costs. The Court will not ordinarily overrule the discretion exercised by the judge at the trial, though the decisions upon this point are not quite uniform: *Hatch* v. *Lewis*, 7 H. & N. 367; *Hinde* v. *Sheppard*, L. R. 7 Ex. 21; *Flitters* v. *Allfrey*, L. R. 10 C. P. 29; *Strachey* v. *Lord Osborne*, L. R. 10 C. P. 92. But upon new materials, or a different view of the case, the Court have allowed costs where the judge had refused to certify: *Sampson* v. *Mackay*, L. R. 4 Q. B. 643; *Courtenay* v. *Wagstaff*, 16 C. B. N. S. 110. Application.

By s. 7: "Where in any action of contract brought or commenced in any of her Majesty's Superior Courts of Common Law the claim indorsed on the writ does not exceed fifty pounds, or where such claim, though it originally exceeded fifty pounds, is reduced by payment, an admitted set-off or otherwise, to a sum not exceeding fifty pounds, it shall be lawful for the defendant in the action, within eight days from the day upon which the writ shall have been served upon him, if the whole or part of the demand of the plaintiff be contested, to apply to a judge at chambers for a summons to the plaintiff to show cause why such action should not be tried in the County Court or one of the County Courts in which the action might have been commenced; and on the hearing of such summons the judge shall, unless there be good cause to the contrary, order such action to be tried accordingly, and thereupon the plaintiff shall lodge the original writ and the order with the registrar of the County Court mentioned in the order, who shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the registrar to both parties or their attorneys, and the cause and all proceedings therein shall be heard and taken in such County Court as if the action had been originally commenced in such County Court; and the costs of the parties in respect of proceedings subsequent to the order of the judge of the Superior Court shall be allowed according to the scale of costs in use in the County Courts, and the costs of the proceedings previously had in the Superior Court shall be allowed according to the scale in use in such latter Court." In certain cases judge of Superior Courts may order cause to be tried in County Court.

This section, it will be observed, is in its terms limited to actions of (*a*) contract, (*b*) in a Common Law Court, (*c*) in which the claim indorsed is not more than £50. The words "reduced by payment" in this section, mean reduced by payment before action brought: *Osborne* v. *Homburg*, 1 Ex. D. 48; *Foster* v. *Usherwood*, 3 Ex. D., 1, C. A. A claim indorsed on a writ for "£50 and interest at 5 per cent. from the date hereof till payment or judgment" is a claim exceeding £50: *Insley* v. *Jones*, 4 Ex. D. 16. The application can only be made by the defendant, and within eight days after the service of the writ. The cause, if an order is made, becomes for all purposes a County Court cause, and the Superior Court has no further control over it: *Moody* v. *Steward*, 19 W. R. 161, Ex. For form of order see App. H. No. 42, *post*, p. 596.

The power given by this section must not be confounded with that under 19 & 20 Vict. c. 108, s. 26, on the application of either party after issue joined, to order the trial of an action of contract 19 & 20 Vict. c. 108.

Act 1873, s. 67.

to take place in a County Court, the action still remaining one in the Superior Court: see *Wheatcroft* v. *Foster*, E. B. & E. 737: *Balmforth* v. *Pledge*, L. R. 1 Q. B. 427. This last-mentioned power is not affected by the Judicature Acts: see, for instance, *Davis* v. *Godbehere*, 4 Ex. D. 215, C. A.; and a form of judgment on an action so sent down for trial: App. D. No. 12, *post*, p. 545; as to costs in such case, see O. LV., *post*, p. 406.

Proceedings in Equity may be transferred to County Courts which might have commenced therein.

By s. 8: "Where any suit or proceeding shall be pending in the High Court of Chancery, which suit or proceeding might have been commenced in a County Court, it shall be lawful for any of the parties thereto to apply at chambers to the judge to whose Court the said suit or proceeding shall be attached to have the same transferred to the County Court or one of the County Courts in which the same might have been commenced, and such judge shall have power upon such application, or without such application if he shall see fit, to make an order for such transfer, and thereupon such suit or proceeding shall be carried on in the County Court to which the same shall be ordered to be transferred, and the parties thereto shall have the same right of appeal that they would have had had the suit or proceeding been commenced in the County Court."

Transfer under this section has been held to be a matter for the discretion of the judge before whom the cause is pending, with which the Court of Appeal would not interfere: see *Linford* v. *Gudgeon*, L. R. 6 Ch. 359.

Actions for malicious prosecution, &c., brought in Superior Courts may be remitted to County Court by Judge.

By s. 10: "It shall be lawful for any person against whom an action for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort may be brought in a Superior Court, to make an affidavit that the plaintiff has no visible means of paying the costs of the defendant should a verdict be not found for the plaintiff; and thereupon a judge of the Court in which the action is brought shall have power to make an order that unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of one of the masters of the said Court, or satisfy the judge that he has a cause of action fit to be prosecuted in the Superior Court, all proceedings in the action shall be stayed, or in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the judge as aforesaid, that the cause be remitted for trial before a County Court to be therein named; and thereupon the plaintiff shall lodge the original writ and the order with the registrar of such County Court, who shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the registrar to both parties or their attorneys; and the County Court so named shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed, by a memorandum signed by them, that the said County Court should have power to try the said action, and the same had been commenced by plaint in the said County Court; and the costs of the parties in respect of the proceedings subsequent to the order of the judge of the Superior Court shall be allowed according to the scale of costs in use in the County Courts, and the costs of the proceedings in the Superior Court shall be allowed according to the scale in use in such latter Court."

The section is limited to actions of tort. The application may be made at any time, but only by the defendant. The effect of the order is to transform the action into a County Court cause.

With respect to the relief which can be given in a County Court, see ss. 88 to 91, *post*, pp. 88—90. **Act 1873, ss. 67—73.**

68. [*Rules of Court may be made by Order in Council before commencement of the Act.*] **Sect. 68.**

This section, as well as ss. 69, 70, and 74, by which the making of Rules was to be governed, were repealed by s. 33 of the Act of 1875, *post*, pp. 125, 127. See s. 17 of the Act of 1875, *post*, p. 109, and note thereto.

69. [*Rules in Schedules to regulate procedure till changed by other rules after commencement of Act.*] **Sect. 69.**

This section is repealed by the Act of 1875 : see note to section 68, *supra*.

70. [*Rules of Probate, Divorce, Admiralty, and Bankruptcy Courts to be Rules of the High Court.*] **Sect. 70.**

This section is repealed by s. 33 of the Act of 1875, *post*, pp. 125, 127, and section 18 of that Act is substituted for it.

71. [*Criminal procedure, subject to future Rules, to remain unaltered.*] **Sect. 71.**

This section is repealed by s. 33 of the Act of 1875, *post*, pp. 125, 127, and s. 19 of that Act is substituted for it : see *post*, p. 111.

72. [*Act not to affect rules of evidence or juries.*] **Sect. 72.**

This section is repealed by s. 33 of the Act of 1875, *post*, pp. 125, 127, and s. 20 of that Act is substituted for it : see *post*, p. 112.

As to evidence in general, see O. XXXVII. and O. XXXVIII., *post*, pp. 342, 347.

73. [*Saving of existing procedure of Courts when not inconsistent with this Act or Rules.*] **Sect. 73.**

This section is repealed by s. 33 of the Act of 1875, *post*, pp. 125, 127, and s. 21 of that Act is substituted for it : see *post*, p. 112.

S. 22 expressly reserves to any party upon a trial by jury the right to require the judge to leave the issues to the jury with a proper direction in point of law, and allows this right to be enforced by a proceeding analogous to a Bill of Exceptions. As to this, see note to s. 46, *ante*, p. 57.

See note at the head of the schedule of Rules, *post*, p. 175 ; O. LXII., *post*, p. 443.

Act 1873, ss. 74—76.

74. [*Power to make and alter Rules after commencement of Act.*]

Sect. 74.

This section is repealed by s. 33 of the Act of 1875, *post*, pp. 125, 127. As to the existing power of making rules, see note to s. 17 of the Act of 1875, *post*, p. 110.

Sect. 75. Councils of Judges to consider procedure and administration of justice.

75. A council of the judges of the Supreme Court, of which due notice shall be given to all the said judges, shall assemble once at least in every year, on such day or days as shall be fixed by the Lord Chancellor, with the concurrence of the Lord Chief Justice of England, for the purpose of considering the operation of this Act and of the Rules of Court for the time being in force, and also the working of the several offices and the arrangements relative to the duties of the officers of the said Courts respectively, and of enquiring and examining into any defects which may appear to exist in the system of procedure or the administration of the law in the said High Court of Justice or the said Court of Appeal, or in any other Court from which any appeal lies to the said High Court or any Judge thereof, or to the said Court of Appeal: And they shall report annually to one of Her Majesty's principal Secretaries of State what (if any) amendments or alterations it would in their judgment be expedient to make in this Act, or otherwise relating to the administration of justice, and what other provisions (if any) which cannot be carried into effect without the authority of Parliament it would be expedient to make for the better administration of justice. Any extraordinary council of the said judges may also at any time be convened by the Lord Chancellor.

See s. 32, *ante*, p. 41, which enables Her Majesty by Order in Council on the recommendation of the Council of the Judges to alter the Divisions of the High Court, and, under certain conditions, to abolish the Common Law chiefships and the office of Master of the Rolls.

Sect. 76. Acts of Parliament relating to former Courts to be read as applying to Courts under this Act.

76. All Acts of Parliament relating to the several Courts and judges, whose jurisdiction is hereby transferred to the said High Court of Justice and the said Court of Appeal respectively, or wherein any of such Courts or judges are mentioned or referred to, shall be construed and take effect, so far as relates to anything done or to be done after the commencement of this Act, as if the said High Court of Justice or the said Court of Appeal, and the judges thereof respectively, as the case may be, had been named therein instead of such Courts

or judges whose jurisdiction is so transferred respectively; and in all cases not hereby expressly provided for in which, under any such Act, the concurrence or the advice or consent of the judge or any judges, or of any number of the judges, of any one or more of the Courts whose jurisdiction is hereby transferred to the High Court of Justice is made necessary to the exercise of any power or authority capable of being exercised after the commencement of this Act, such power or authority may be exercised by and with the concurrence, advice, or consent of the same or a like number of Judges of the said High Court of Justice; and all general and other commissions, issued under the Acts relating to the Central Criminal Court or otherwise, by virtue whereof any judges of any of the Courts whose jurisdiction is so transferred may, at the commencement of this Act, be empowered to try, hear, or determine any causes or matters, criminal or civil, shall remain and be in full force and effect unless and until they shall respectively be in due course of law revoked or altered.

Act 1873, ss. 76, 77.

See *Commissioners of Sewers* v. *Gellatly*, 24 W. R. 1059, M. R.; and *Marris* v. *Ingram*, 13 Ch. D. 338, M. R., where a question arose on the construction of s. 4, sub-s. 3 of the Debtors Act, 1869.

PART V.

OFFICERS AND OFFICES.

77. The Queen's Remembrancer, and all masters, secretaries, registrars, clerks of records and writs, associates, prothonotaries, chief and other clerks, commissioners to take oaths or affidavits, messengers, and other officers and assistants at the time of the commencement of this Act attached to any Court or judge whose jurisdiction is hereby transferred to the High Court, or to the Court of Appeal, and also all registrars, clerks, officers, and other persons at the time of the commencement of this Act engaged in the preparation of commissions or writs, or in the registration of judgments or any other ministerial duties in aid of, or connected with, any Court, the jurisdiction of which is hereby transferred to the said Courts respectively, shall, from and after the commencement of this Act, be attached to the Supreme Court, con-

Sect. 77. Transfer of existing staff of officers to Supreme Court.

Act 1873, s. 77.

sisting of the said High Court of Justice and the said Court of Appeal: Provided, that all the duties with respect to appeals from the Court of Chancery of the County Palatine of Lancaster which are now performed by the clerk of the council of the Duchy of Lancaster shall be performed by the registrars, taxing masters, and other officers by whom like duties are discharged in the Supreme Court; and the said clerk of the council of the Duchy of Lancaster shall not be an officer attached to the said Court.

The officers so attached shall have the same rank and hold their offices by the same tenure and upon the same terms and conditions, and receive the same salaries, and, if entitled to pensions, be entitled to the same pensions, as if this Act had not passed; and any such officer who is removable by the Court to which he is now attached, shall be removable by the Court to which he shall be attached under this Act, or by the majority of the judges thereof.

The existing registrars and clerks to the registrars in the Chancery Registrars' office shall retain any right of succession secured to them by Act of Parliament, so as to entitle them in that office, or in any substituted office, to the succession to appointments with similar or analogous duties, and with equivalent salaries.

The business to be performed in the High Court of Justice and in the Court of Appeal respectively, or in any divisional or other Court thereof, or in the chambers of any judge thereof, other than that performed by the judges, shall be distributed among the several officers attached to the Supreme Court by this section in such manner as may be directed by Rules of Court; and such officers shall perform such duties in relation to such business as may be directed by Rules of Court, with this qualification, that the duties required to be performed by any officer shall be the same, or duties analogous to those which he performed previously to the passing of this Act; and, subject to such Rules of Court, all such officers respectively shall continue to perform the same duties, as nearly as may be, in the same manner as if this Act had not passed.

All secretaries, clerks, and other officers attached to any existing judge who under the provisions of this Act shall become a Judge of the High Court of Justice, or of the Court of Appeal, shall continue attached to such judge, and shall perform the same duties as those which they have hitherto performed, or duties analogous thereto; and

all such last-mentioned officers shall have the same rank and hold their offices by the same tenure, and upon the same terms and conditions, and receive the same salaries, and, if entitled to pensions, be entitled to the same pensions, as if this Act had not passed: Provided that the Lord Chancellor may, with the consent of the Treasury, increase the salary of any existing officer whose duties are increased by reason of the passing of this Act. Act 1873, s. 77.

Upon the occurrence of a vacancy in the office of any officer coming within the provisions of this section, the Lord Chancellor, with the concurrence of the Treasury, may, in the event of such office being considered unnecessary, abolish the same, or may reduce the salary, or alter the designation or duties thereof, notwithstanding that the patronage thereof may be vested in an existing judge. Nothing in this Act contained shall interfere with the office of marshal attending any Commissioner of Assize.

See s. 34 of the Act of 1875, s. 21 of the Act of 1876, and s. 6 of the Act of 1877, which make temporary provision for the filling up of vacancies in offices.

Some doubt seems to have been felt as to the extent of the powers conferred by this section; for when it was determined to amalgamate the greater part of the various offices into the Central Office, the amalgamation was carried out by the Act of 1879, and not by Rules of Court. The sections of the Supreme Court of Judicature (Officers) Act, 1879, which relate to the subject matter dealt with by this section are as follows:

S. 4. There shall be established a central office of the Supreme Court of Judicature. Establishment of central office.

S. 5. There shall be concentrated in and amalgamated with the central office the following offices; namely, Certain offices amalgamated with central office.

The record and writ clerks office;
The enrolment office;
The report office;
The offices of the masters of the Queen's Bench, Common Pleas, and Exchequer Divisions, including the bills of sale office;
The offices of the associates in the Queen's Bench, Common Pleas, and Exchequer Divisions;
The Crown office of the Queen's Bench Division;
The Queen's remembrancer's office;
The office of the registrar of certificates of acknowledgments of deeds by married women;
The office of the registrar of judgments; and
Such other offices of the Supreme Court as may from time to time be amalgamated with the central office by rules of court.

S. 6. There shall be transferred to the central office,— Transfer certain officers to central office.

(*a*) The existing record and writ clerks;
The existing clerk of enrolments;
The existing clerks in the report office;

Act 1873, ss. 77, 78.

The existing masters of the Queen's Bench, Common Pleas, and Exchequer Divisions;
The existing associates in the Queen's Bench, Common Pleas, and Exchequer Divisions;
The existing Queen's remembrancer;
The existing Queen's coroner and attorney, and the existing master of the Crown office other than the Queen's coroner and attorney;
The existing registrar of certificates of acknowledgment of deeds by married women; and
The existing registrar of judgments;

with their respective clerks and messengers, or the clerks and messengers employed in their respective offices;

(*b*) Such of the existing officers employed under the registrars of the Probate, Divorce, and Admiralty Division as the Judges of that Division respectively select as necessary for the performance of the duties to be performed in the central office; and

(*c*) Such other officers of and persons employed in the Supreme Court or the offices thereof as are from time to time transferred to the central office by rules of court.

Central office to be under control of masters of Supreme Court.

S. 7. The central office shall be under the control and superintendence of officers called masters of the Supreme Court of Judicature.

Provided that the existing clerk of enrolments shall as long as he continues to hold that office retain his control and superintendence over the business heretofore performed in his office and over the persons for the time being employed in the performance of that business.

See O. LX. and O. LXA., *post*, p. 432, as to the distribution of business among the different departments of the Central Office. Under s. 14 of this Act the office of clerk of enrolments will be abolished on the next vacancy. See further s. 84, *post*, p. 82, and note thereto.

By s. 21 of the Act of 1881, *post*, p. 170, notice of any vacancy in any office of the Supreme Court must be given to the Lord Chancellor and the Treasury, and the appointment must not be filled up until the expiration of one month from the notice.

By s. 23 of the Act of 1881, *post*, p. 171, power is given to the Lord Chancellor to regulate appointments to keep order in, and clear the Royal Courts of Justice.

As to salaries of officers, see note to s. 85, *post*, p. 86.

As to increasing or diminishing the number of officers, see s. 20 of the Act of 1881, *post*, p. 169, and note thereto.

Sect. 78. Officers of Courts of Pleas at Lancaster and Durham.

78. The existing Queen's Counsel of the County Palatine of Lancaster shall for the future have the same precedence in the county, and the existing prothonotaries and district prothonotaries, and other officers of the Court of Common Pleas at Lancaster and the Court of Pleas at Durham respectively, and their successors, shall (subject to Rules of Court) perform the same or the like duties and exercise the same or the like powers and authorities in respect of all causes and matters depending in those

Courts respectively at the commencement of this Act, and also in respect of all causes and matters which may afterwards be commenced in the High Court of Justice in the manner heretofore practised in the said Court of Common Pleas at Lancaster and the said Court of Pleas at Durham respectively, as at the commencement of this Act may lawfully be performed and exercised by them respectively under any Acts of Parliament for the time being in force with respect to the said last-mentioned Courts respectively, or under any other authority; and all powers in respect of any such prothonotaries, district prothonotaries, or other officers of the Court of Common Pleas at Lancaster, which at the commencement of this Act may be vested by law in the Chancellor of the Duchy and County Palatine of Lancaster, under any such Act of Parliament or otherwise, and to which the concurrence of any other authority may not be required, shall and may be exercised after the commencement of this Act by the Lord Chancellor; and all the powers of making or publishing any general rules or orders with respect to the powers or duties of such prothonotaries, district prothonotaries, or other officers of the said Court of Common Pleas at Lancaster or the said Court of Pleas at Durham, or with respect to the business of the said Court respectively, or with respect to any fees to be taken therein, or otherwise with reference thereto, which under any such Act as aforesaid or otherwise by law may be vested in the Chancellor of the Duchy and County Palatine of Lancaster, with the concurrence of any judges or judge, or in any other authority, shall be exercised after the commencement of this Act in the manner hereby provided with respect to Rules of Court to be made under this Act, and (in all cases in which the sanction of the Treasury is now required) with the sanction of the Treasury; and all provisions made by any such Acts as aforesaid, or otherwise for or with respect to the remuneration of any such prothonotaries, district prothonotaries, or other officers as aforesaid, shall remain and be in full force and effect until the same shall be altered under the provisions of this Act, or otherwise by lawful authority.

Act 1873, ss. 78, 79.

As to the Fee Fund of the Courts of Lancaster and Durham, and the salaries of the officers of those Courts, see s. 26 of the Act of 1875, *post*, p. 116.

79. Each of the Judges of the High Court of Justice, and of the ordinary Judges of the Court of Appeal, ap-

Sect. 79. Personal officers of

Act 1873, s. 79.

pointed respectively after the commencement of this Act, and also such of the ordinary Judges of the Court of Appeal as have no similar officers at the time of the commencement of this Act, shall have such officers as hereinafter mentioned, who shall be attached to his person as such judge, and appointed and removable by him at his pleasure, and who shall respectively receive the salaries hereinafter mentioned (that is to say):

future judges.

To the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, respectively, there shall be attached a secretary, whose salary shall be five hundred pounds per annum, a principal clerk, whose salary shall be four hundred pounds per annum, and a junior clerk, whose salary shall be two hundred pounds per annum. To each of the other Judges of the High Court of Justice, and to each of the ordinary Judges of the Court of Appeal, there shall be attached a principal clerk, whose salary shall be four hundred pounds per annum, and, in the case of the Judges of the High Court of Justice, a junior clerk, whose salary shall be two hundred pounds per annum.

Such one or more of the officers so attached to each of the said judges, as such judge shall think fit, shall be required, while in attendance on such judge, to discharge without further remuneration, the duties of crier in Court or on circuit, or of usher or train bearer. The duties of chamber clerks, so far as relates to business transacted in chambers by judges appointed after the commencement of this Act, shall be performed by officers of the Court in the permanent civil service of the Crown.

Chamber clerks.

By the Act of 1875, s. 35, it is enacted "that any person who at the time of the commencement of this Act shall hold the office of chamber clerk, shall be eligible at any time thereafter for appointment to the like office, anything in the principal Act to the contrary notwithstanding; and that if any such person shall be so appointed after the commencement of this Act, he shall, if the salary assigned to such office by or under the principal Act be less than the salary received by him at the time of the commencement of this Act, be entitled to receive a salary not less than that so formerly received by him, so long as he shall retain such office, but shall not be entitled to receive or claim any pension in respect of his service, unless the Treasury, in its absolute discretion, shall think fit to sanction the same."

Appointments have been made under this section, and the work formerly done by judges' Chambers' clerks is now done by the Summons and Order Department of the Central Office: see O. LXA. r. 1, *post*, p. 433.

Act 1873, ss. 80—82.

Provisions as to officers paid out of fees.

80. Any existing officer attached to any existing Court or judge whose jurisdiction is abolished or transferred by this Act, who is paid out of fees, and whose emoluments are affected by the passing of this Act shall be entitled to prefer a claim to the Treasury; and the Treasury, if it shall consider his claim to be established, shall have power to award to him such sum, either by way of compensation, or as an addition to his salary, as it thinks just, having regard to the tenure of office by such officer and to the other circumstances of the case.

By s. 26 of the Act of 1879, *post*, p. 152, the provisions of that Act are not to affect any liability to the payment of fees payable to any officer affected by the Act, but such fees are subject to Rules of Court to continue to be payable as heretofore. As to the payment of fees in general, see s. 26 of the Act of 1875, and note thereto, *post*, p. 116.

Sect. 81.

Doubts as to the status of officers to be determined by rule.

81. Where a doubt exists as to the position under this Act of any existing officer attached to any existing Court or judge affected by this Act, such doubt may be determined by Rules of Court: subject to this proviso, that such Rules of Court shall not alter the tenure of office, rank, pension (if any), or salary of such officer, or require him to perform any duties other than duties analogous to those which he has already performed.

This section gives no power to determine by Rule of Court what persons are or are not officers of the Court. A wider power has accordingly been given by s. 24 of the Act of 1879, which is as follows:

Where a doubt exists as to the position under this Act of any existing officer affected by this Act, or whether any person is an officer of the Supreme Court within the meaning this Act, the doubt may be determined by rules of court, subject to this proviso, that a rule of court made under this section shall not alter the tenure of office, rank, pension, if any, or salary of the officer, or require him without his consent to perform any duties other than duties analogous to those which he has already performed.

By O. LXIII. r. 2, *post*, p. 445, "Officer of the Supreme Court" is defined as any officer paid wholly or partly out of public money, who is attached to the Supreme Court, the High Court of Justice, or the Court of Appeal, or to any Judge of any of those Courts, and is not an officer attached to the person of a Judge and removable by him at pleasure.

Sect. 82.

Powers of Commissioners to administer oaths.

82. Every person who at the commencement of this Act shall be authorized to administer oaths in any of the Courts whose jurisdiction is hereby transferred to the High Court of Justice, shall be a commissioner to administer oaths in all causes and matters whatsoever which

Act 1873, ss. 82—84.

may from time to time be depending in the said High Court or in the Court of Appeal.

See *Re Thomas*, W. N. 1875. p. 188, M. R.: *Barwick* v. *Yeadon Local Board*, *Ibid.* 189; 24 W. R. 23. V.-C. B.

A uniform scale of fees to be taken by all commissioners is provided by R. S. C. (Costs), *post*, p. 624.

Sect. 83. Official Referees to be appointed.

83. There shall be attached to the Supreme Court permanent officers to be called official referees, for the trial of such questions as shall under the provisions of this Act be directed to be tried by such referees. The number and the qualifications of the persons to be so appointed from time to time, and the tenure of their offices, shall be determined by the Lord Chancellor, with the concurrence of the presidents of the divisions of the High Court of Justice, or a majority of them (of which majority the Lord Chief Justice of England shall be one), and with the sanction of the Treasury. Such official referees shall perform the duties intrusted to them in such places, whether in London or in the country, as may from time to time be directed or authorized by any order of the said High Court or of the Court of Appeal; and all proper and reasonable travelling expenses incurred by them in the discharge of their duties shall be paid by the Treasury out of moneys to be provided by Parliament.

As to the matters which may be referred to the official referees, and the mode of procedure before them, see ss. 56 to 59, *ante*, pp. 63 to 65; O. XXXVI. rr. 30 to 34, *post*, p. 331 to 341, and note thereto. For forms of orders of references, see Seton on Decrees, p. 393, ed. 4. and Ap. H. forms, No 31 and 32, *post*, p. 591. As to Court fees in proceedings before official referees, see Order 24th April, 1877, *post*, p. 669; as to their rota, see R. S. C., June, 1876, rr. 14 to 16 (O. XXXVI. 29A, B, C), *post*, pp. 331, 332; as to their salaries, see note to s. 85, *post*, p. 86; and as to times of sitting, O. LXI. r. 8, *post*, p. 442.

Sect. 84. Duties, appointment, and removal of officers of Supreme Court.

84. Subject to the provisions in this Act contained with respect to existing officers of the Courts whose jurisdiction is hereby transferred to the Supreme Court, there shall be attached to the Supreme Court such officers as the Lord Chancellor, with the concurrence of the presidents of the divisions of the High Court of Justice, or the major part of them, of which majority the Lord Chief Justice of England shall be one, and with the sanction of the Treasury, may from time to time determine.

Such of the said several officers respectively as may be thought necessary or proper for the performance of any special duties, with respect either to the Supreme Court

generally, or with respect to the High Court of Justice or the Court of Appeal, or with respect to any one of the divisions of the said High Court, or with respect to any particular judge or judges of either of the said Courts, may by the same authority, and with the like sanction as aforesaid, be attached to the said respective Courts, divisions, and judges accordingly. Act 1873, s. 84.

All officers assigned to perform duties with respect to the Supreme Court generally, or attached to the High Court of Justice or the Court of Appeal, and all commissioners to take oaths or affidavits in the Supreme Court, shall be appointed by the Lord Chancellor.

All officers attached to the Chancery Division of the said High Court, who have been heretofore appointed by the Master of the Rolls, shall continue, while so attached, to be appointed by the Master of the Rolls.

All other officers attached to any division of the said High Court shall be appointed by the president of that division.

All officers attached to any judge shall be appointed by the judge to whom they are attached.

Any officer of the Supreme Court (other than such officers attached to the person of a judge as are hereinbefore declared to be removable by him at his pleasure) may be removed by the person having the right of appointment to the office held by him, with the approval of the Lord Chancellor, for reasons to be assigned in the order of removal.

The authority of the Supreme Court over all or any of its officers may be exercised in and by the said High Court and the said Court of Appeal respectively, and also in the case of officers attached to any division of the High Court by the president of such division, with respect to any duties to be discharged by them respectively.

This section is modified by the Act of 1879, which erected the Central Office. The sections of that Act which deal with the subject matter of this section are as follows:

S. 8. (1.) The first masters of the Supreme Court of Judicature shall be— First masters of Supreme Court.

The existing masters of the Queen's Bench, Common Pleas, and Exchequer Divisions;

The existing Queen's coroner and attorney;

The existing master of the Crown office other than the Queen's coroner and attorney;

The existing record and writ clerks; and

The existing associates in the Queen's Bench, Common Pleas, and Exchequer Divisions.

Act 1873, s. 34.

(2.) The salaries of the first masters of the Supreme Court shall be:

(*a*) In the case of each existing master of the Queen's Bench, Common Pleas, or Exchequer Division, the salary to which he is entitled as such master at the commencement of this Act:

(*b*) In the case of the existing Queen's coroner and attorney and the existing master of the Crown office other than the Queen's coroner and attorney, the yearly sum of fifteen hundred pounds:

(*c*) In the case of every other master of the Supreme Court, the salary to which he would have been entitled if he had been appointed a master of the Queen's Bench, Common Pleas, or Exchequer Division immediately before the commencement of this Act.

As to the salaries of future masters, see s. 15 of the Act of 1879, *post*, p. 149.

(3.) A vacancy in the office of any master of the Supreme Court other than a master being Queen's coroner and attorney or master of the Crown office, shall not be filled until the number of masters is reduced to eighteen.

The number of masters created by this section is twenty-two.

Appointment and removal of officers of central office.

S. 9. (1.) The right of filling any vacancy in the office of master of the Supreme Court, or in any clerkship in the central office, shall, subject as in the next sub-section mentioned, be vested in the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer in rotation and in such order as they by agreement among themselves determine.

(2.) The right of filling any vacancy in the office of Queen's coroner and attorney and of master in the Crown Office shall be vested in the Lord Chief Justice of England, and the persons appointed to these offices respectively shall be by virtue of their appointment masters of the Supreme Court.

(3.) Subject as aforesaid, the right of filling any vacancy in, and of making any new appointment in or for the purposes of, the central office shall be vested in the Lord Chancellor with the concurrence of the Treasury.

(4.) Any officer of the central office may be removed by a majority of the Judges mentioned in this section, with the approval of the Lord Chancellor, for reasons to be assigned in the order of removal.

Qualification of masters of Supreme Court.

S. 10. A person shall not be qualified to be appointed a master of the Supreme Court unless he is or has been a practising barrister or solicitor of five years' standing, or has practised for five years as a special pleader or as a special pleader and barrister; but nothing in this section shall affect the qualification of any existing officer of the Supreme Court to be appointed to any office dealt with by this Act.

Tenure of masters of Supreme Court.

S. 11. Every master of the Supreme Court shall hold office during good behaviour.

Business of central office.

S. 12. (1.) The business to be performed in the central office shall, subject to rules of court, comprise all the business performed

in the offices by or in pursuance of this Act amalgamated with the central office, and shall be distributed among the several officers of the central office in such manner as may be directed by rules of court. Act 1873, s. 84.

(2.) The several officers of the central office shall be interchangeable one with another and shall be capable of performing and liable to perform the duties of each other in any department of the office, and generally shall perform such duties and have such powers in relation to the business of the Supreme Court as may be directed by rules of court, subject to this qualification, that the duties required to be performed by any officer transferred to the central office by or in pursuance of this Act shall, except as far as they are modified with his consent, be the same as or analogous to those which he performed before being so transferred.

(3.) Subject as aforesaid, all officers of the central office shall continue to perform the duties heretofore performed by them in their respective offices, and to have and exercise the powers heretofore vested in them, in the same manner, as nearly as may be, as if this Act had not passed.

S. 13. The clerks employed in the central office shall be classified as principal clerks, first-class clerks, second-class clerks, and copying clerks, or in such other manner as the Lord Chancellor, with the concurrence of the Treasury, from time to time directs. Classification of clerks of central office.

S. 14. (1.) The offices specified in the first part of the First Schedule to this Act are hereby abolished as from the commencement of this Act. Abolition of certain offices and continuance of others.

(2.) Each of the offices specified in the second part of the First Schedule to this Act shall be abolished on the occurrence of the next vacancy therein.

(3.) On and after the occurrence of the next vacancy in any of the offices specified in the third part of the First Schedule to this Act, the senior master for the time being of the Supreme Court shall hold and perform the duties of the office, with such additional salary in respect of the office of Queen's Remembrancer as the Lord Chancellor, with the concurrence of the Treasury, may determine.

(4.) Provided as follows:

(*a*) For the purposes of this section the existing masters of the Queen's Bench, Common Pleas, and Exchequer Divisions shall collectively rank as senior to the other first masters of the Supreme Court;

(*b*) Subject as aforesaid, each of the first masters of the Supreme Court shall, for the purposes of this section, rank in seniority according to the date of his first appointment to an office in the Supreme Court, or in any court of which the jurisdiction has been transferred to the Supreme Court.

The Schedule referred to is as follows:

FIRST PART.

Offices to be abolished as from commencement of Act.

The offices of—

Record and Writ Clerk;

Act 1873, ss. 84, 85.

Master in the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court of Justice;
Associate in the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court of Justice.

SECOND PART.

Offices to be abolished on next vacancy.

The offices of—

Clerk of Enrolments:
Clerk of Petty Bag.

THIRD PART.

Offices to be filled on vacancy by the Senior Master of the Supreme Court.

The offices of—

Queen's Remembrancer:
Registrar of Certificates of Acknowledgments of Deeds by Married Women:
Registrar of Judgments.

By s. 27 of the Act of 1879 it is provided as follows:

Construction of enactments, &c. referring to officers or offices affected by this Act.

S. 27. Any enactment or document referring to an officer or office abolished by or under this Act, shall, as far as it continues applicable, be construed as referring to the officer or office substituted by or under this Act, and rules of court may be made for determining what officer or office is so substituted.

Sect. 85. Salaries and pensions of officers.

85. *There shall be paid to every official referee and other salaried officer appointed in pursuance of this Act such salary out of moneys to be provided by Parliament as may be determined by the Treasury with the concurrence of the Lord Chancellor.*

An officer attached to the person of a judge shall not be entitled to any pension or compensation in respect of his retirement from or the abolition of his office, except so far as he may be entitled thereto independently of this Act; but every other officer to be hereafter appointed in pursuance of this part of this Act, and whose whole time shall be devoted to the duties of his office, shall be deemed to be employed in the permanent Civil Service of Her Majesty, and shall be entitled, as such, to a pension or compensation in the same manner, and upon the same terms and conditions, as the other permanent civil servants of Her Majesty are entitled to pension or compensation.

This section is repealed by s. 29 of the Act of 1879, *post*, p. 153, and the more specific provisions of ss. 15 to 21 of that Act are substituted for it, see *post*. pp. 149—151; s. 15 of the Act of 1879, in so far as it relates to salaries, and the mode of fixing them, is modified by s. 20 of the Act of 1881, *post*, p. 169.

86. Subject to the provisions hereinbefore contained, any rights of patronage and other rights or powers incident to any Court, or to the office of any judge of any Court whose jurisdiction is transferred to the said High Court of Justice, or to the said Court of Appeal, in respect of which rights of patronage or other rights or powers no provision is or shall be otherwise made by or under the authority of this Act, shall be exercised as follows, that is to say: if incident to the office of any existing judge shall continue to be exercised by such existing judge during his continuance in office as a judge of the said High Court or of the Court of Appeal, and after the death, resignation, or removal from office of such existing judge shall be exercised in such manner as Her Majesty may by Sign Manual direct.

Sect. 86. Patronage not otherwise provided for.

87. From and after the commencement of this Act all persons admitted as solicitors, attorneys, or proctors of or by law empowered to practise in any Court, the jurisdiction of which is hereby transferred to the High Court of Justice or the Court of Appeal, shall be called solicitors of the Supreme Court, and shall be entitled to the same privileges and be subject to the same obligations, so far as circumstances will permit, as if this Act had not passed; and all persons who from time to time, if this Act had not passed, would have been entitled to be admitted as solicitors, attorneys, or proctors of or been by law empowered to practise in any such Courts, shall be entitled to be admitted and to be called solicitors of the Supreme Court, and shall be admitted by the Master of the Rolls, and shall, as far as circumstances will permit, be entitled as such solicitors to the same privileges, and be subject to the same obligations as if this Act had not passed.

Sect. 87. Solicitors and attorneys.

Any solicitors, attorneys, or proctors to whom this section applies shall be deemed to be officers of the Supreme Court; and that Court, and the High Court of Justice, and the Court of Appeal respectively, or any division or judge thereof, may exercise the same jurisdiction in respect of such solicitors or attorneys as any one of Her Majesty's Superior Courts of Law or Equity might previously to the passing of this Act have exercised in respect of any solicitor or attorney admitted to practise therein.

Section 14 of the Act of 1875, *post*, p. 108, enacts, with reference to this section, as follows:

Act 1873, ss. 87—89.

S. 14. "Whereas under s. 87 of the principal Act, solicitors and attorneys will, after the commencement of that Act, be called solicitors of the Supreme Court: Be it therefore enacted that—

Amendment of 36 & 37 Vict. c. 66, s. 87, as to enactments relating to attorneys.

The registrar of attorneys and solicitors in England shall be called the Registrar of Solicitors, and the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron, or any two of them, may, from time to time, by regulation adapt any enactments relating to attorneys, and any declaration, certificate, or form required under those enactments to the solicitors of the Supreme Court under s. 87 of the principal Act."

Regulations, dated the 2nd of November, 1875, were issued in pursuance of the last-mentioned section. But by the Solicitors Act, 1877 (40 & 41 Vict. c. 25), those regulations ceased to be in force on the 1st Jan., 1878. The making of regulations on the subject is for the future governed by that Act, as modified by s. 24 of the Act of 1881, *post*, p. 171. Regulations were made under it which came into force on the 1st January, 1878.

The effect of this section is to entitle any person capable of practising in any of the Courts consolidated to form the Supreme Court, to be admitted to practise in any branch of the Supreme Court: *Re Toller*, W. N. 1875, p. 254, M. R.; *Crisp* v. *Martin*, 1 P. D. 302. But it did not authorize any person other than a proctor of the Arches Court to practise in that Court: *Crisp* v. *Martin*, *ubi supra*. But now, by the Legal Practitioners Act, 1876 (39 & 40 Vict. c. 66), and the Solicitors Act, 1877 (40 & 41 Vict. c. 25), s. 17, solicitors of the Supreme Court may appear as proctors in any ecclesiastical court. By s. 2 of the Legal Practitioners Act, 1877 (40 & 41 Vict. c. 62), surrogates and other unqualified practitioners are forbidden to take instructions for or prepare any papers on which to found or oppose a grant of probate or letters of administration.

As to striking off the rolls, see *Re Martin*, 24 W. R. 111, C. P. D., and *Cave* v. *Cave*, 49 L. J. Ch. 656. The enactments which deal with the subject of striking off the rolls are the 6 & 7 Vict. c. 73, ss. 28—32, 23 & 24 Vict. c. 127, ss. 24, 25, and 37 & 38 Vict. c. 68, ss. 7—11.

PART VI.

JURISDICTION OF INFERIOR COURTS.

Sect. 88.

Power by Order in Council to confer jurisdiction on Inferior Courts.

88. It shall be lawful for her Majesty from time to time by Order in Council to confer on any Inferior Court of civil jurisdiction, the same jurisdiction in Equity and in Admiralty respectively, as any County Court now has, or may hereafter have, and such jurisdiction, if and when conferred, shall be exercised in the manner by this Act directed.

Sect. 89.

Powers of Inferior Courts having Equity and Admiralty jurisdiction.

89. Every Inferior Court which now has or which may after the passing of this Act have jurisdiction in Equity, or at Law and in Equity, and in Admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief,

redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice. Act 1873, ss. 89, 90.

See ss. 24, 25, *ante*, pp. 18, 25, and notes thereto. By s. 228 of the Common Law Procedure Act, 1852, power was given to extend by order in council any of its provisions or any of the rules made under it to any inferior court of record. The C. L. P. Acts, 1854 and 1860, contained similar powers. The Judicature Acts contain no corresponding powers. This is the more remarkable as it is expressly provided that the inferior courts are to administer the same law as the High Court.

S. 27 of the Act of 1881, *post*, p. 173, enables rules made under the County Courts Acts to deal with any matter within county court jurisdiction, which Rules of Court under the Judicature Acts could deal with.

By virtue of this section a County Court can, in an action within its jurisdiction, grant an injunction against a nuisance, and compel obedience thereto by attachment: *Martin* v. *Bannister*, 4 Q. B. D. 212, affirmed, 4 Q. B. D. 491, C. A. See, too, *Richards* v. *Cullerne*, 7 Q. B. D. 623, C. A.

90. Where in any proceeding before any such Inferior Court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counter-claim shall not affect the competence or the duty of the Court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon any such counter-claim: Provided always, that in such case it shall be lawful for the High Court, or any division or judge thereof, if it shall be thought fit, on the application of any party to the proceeding, to order that the whole proceeding be transferred from such Inferior Court to the High Court, or to any division thereof; and in such case the record in such proceeding shall be transmitted by the registrar, or other proper officer, of the Inferior Court to the said High Court; and the same shall thenceforth be continued and prosecuted in the said High Court as if it had been originally commenced therein. Sect. 90. Counter-claims in Inferior Courts, and transfers therefrom.

Under this and the preceding section an inferior court, *e.g.* the Mayor's Court of London can entertain a counter-claim in respect of matters which arose beyond its local jurisdiction, but the power to grant relief in respect of such counter-claim is limited to the amount claimed by the plaintiff: *Davis* v. *Flagstaff Mining Co.*, 3 C. P. D. 228, C. A. As to the wide meaning to be

Act 1873, ss. 90—93.

given to the word "defence" in this section, see per Thesiger, L. J., *ibid.* at p. 242.

An application under this section to transfer proceedings from a County Court to the High Court must not be made *ex parte*, but by summons: *Anon.*, W. N. 1876, p. 12, Lindley, J.

Sect. 91. Rules of law to apply to Inferior Courts.

91. The several Rules of law enacted and declared by this Act shall be in force and receive effect in all Courts whatsoever in England, so far as the matters to which such Rules relate shall be respectively cognizable by such Courts.

See s. 25, *ante*, p. 25, and notes thereto. In *King* v. *Harksworth*, 4 Q. B. D. 371, it was held that by virtue of this section O. LV. as to costs, applied to proceedings in the Liverpool Passage Court. The attention of the Court does not seem to have been called to the terms of s. 17 of the Act of 1875, under which power is given to regulate the costs of proceedings in the Supreme Court by Rules of Court. If it were not for this decision, it would have seemed clear that the intention of this section was merely to apply to inferior courts the rules of law enacted by s. 25.

As regards County Courts, it is now provided by s. 27 of the Act of 1881, *post*, p. 173, that the power to make rules contained in s. 32 of the 19 & 20 Vict. c. 108, shall extend to all matters within the cognisance of County Courts which could be dealt with by Rules of Court under the Judicature Acts.

PART VII.

Miscellaneous Provisions.

Sect. 92. Transfer of books and papers to Supreme Court.

92. All books, documents, papers, and chattels in the possession of any Court, the jurisdiction of which is hereby transferred to the High Court of Justice or to the Court of Appeal, or of any officer or person attached to any such Court, as such officer, or by reason of his being so attached, shall be transferred to the Supreme Court, and shall be dealt with by such officer or person in such manner as the High Court of Justice or the Court of Appeal may by order direct; and any person failing to comply with any order made for the purpose of giving effect to this section shall be guilty of a contempt of the Supreme Court.

Sect. 93. Saving as to circuits, &c.

93. This Act, except as herein is expressly directed, shall not, unless or until other commissions are issued in pursuance thereof, affect the circuits of the judges or the

issue of any Commissions of Assize, Nisi Prius, Oyer and Terminer, Gaol Delivery, or other commissions for the discharge of civil or criminal business on circuit or otherwise, or any patronage vested in any judges going circuit, or the position, salaries, or duties of any officers transferred to the Supreme Court who are now officers of the Superior Courts of Common Law, and who perform duties in relation to either the civil or criminal business transacted on circuit.

By s. 23 of the Act of 1875, *post*, p. 113, power is given to the Queen in Council to alter the existing circuits and make the necessary changes incidental thereto. See Orders in Council. *post*, pp. 690, 696. As to winter assizes, see Winter Assizes Act, 1876 and 1877, *post*, pp. 697, 700. As to spring assizes, see the Spring Assizes Act, 1879, *post*, p. 701. See also note to s. 29, *ante*, p. 38.

As to the jurisdiction of judge, and commissioners on circuit, see ss. 26, 29, 37, *ante*, pp. 36, 50, and notes thereto.

As to the Counties Palatine, see s. 99, *post*, p. 92.

Sect. 94. Saving as to Lord Chancellor.

94. This Act, except so far as herein is expressly directed, shall not affect the office or position of Lord Chancellor; and the officers of the Lord Chancellor shall continue attached to him in the same manner as if this Act had not passed; and all duties, which any officer of the Court of Chancery may now be required to perform in aid of any duty whatsoever of the Lord Chancellor, may in like manner be required to be performed by such officer when transferred to the Supreme Court, and by his successors.

Sect. 95. Saving as to Chancellor of Lancaster.

95. This Act, except so far as is herein expressly directed, shall not affect the offices, position, or functions of the Chancellor of the County Palatine of Lancaster.

The Court of the Chancellor of the Duchy and County Palatine of Lancaster is not affected by the Act: s. 16, *ante*, p. 9, and note thereto. But appeals from that Court will be to the Court of Appeal: s. 18, *ante*, p. 12. By s. 77, *ante*, p. 75, the Clerk to the Council of the Duchy is not to be an officer of the Supreme Court; his duties in respect of appeals are to be discharged by the officers of the Court. All power over officers of the Court of Common Pleas of Lancaster hitherto exercised by the Chancellor of the Duchy is transferred to the Lord Chancellor: s. 78, *ante*, p. 78. And the power of making rules to bind them is transferred to the same body by which rules for the Supreme Court may be framed: *Ibid.*

Sect. 96. Saving as to Chancellor

96. The Chancellor of the Exchequer shall not be a Judge of the High Court of Justice, or of the Court of Appeal, and shall cease to exercise any judicial functions

Act 1873, ss. 96–100.

of the Exchequer, and sheriffs.

hitherto exercised by him as a Judge of the Court of Exchequer; but save as aforesaid he shall remain in the same position as to duties and salary, and other incidents of his office, as if this Act had not passed. The same order and course with respect to the appointment of sheriffs shall be used and observed in the Exchequer Division of the said High Court as has been heretofore used and observed in the Court of Exchequer.

See now as to sheriffs s. 16 of the Act of 1881, *post*, p. 168.

Sect. 97. Saving as to Lord Treasurer and office of the Receipt of Exchequer.

97. Nothing in this Act contained shall affect the office of Lord Treasurer, except that any Lord Treasurer shall not hereafter exercise any judicial functions hitherto exercised by him as a Judge of the Court of Exchequer; and nothing in this Act shall affect the office of the Receipt of the Exchequer.

Sect. 98. Provisions as to great seal being in commission.

98. When the great seal is in commission, the Lords Commissioners shall represent the Lord Chancellor for the purposes of this Act, save that as to the Presidency of the Court of Appeal, and the appointment or approval of officers, or the sanction to any order for the removal of officers, or any other act to which the concurrence or presence of the Lord Chancellor is hereby made necessary, the powers given to the Lord Chancellor by this Act may be exercised by the Senior Lord Commissioner for the time being.

As to the great seal being in commission, and powers of the commissioners, see 1 Will. & Mar. c. 21.

Sect. 99. Provision as to Commissions in Counties Palatine.

99. From and after the commencement of this Act, the Counties Palatine of Lancaster and Durham shall respectively cease to be Counties Palatine, so far as respects the issue of Commissions of Assize, or other like Commissions, but not further or otherwise; and all such Commissions may be issued for the trial of all causes and matters within such counties respectively in the same manner in all respects as in any other counties of England and Wales.

Sect. 100. Interpretation of terms.

100. In the construction of this Act, unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned shall have, or include, the meanings following (that is to say):

"Lord Chancellor" shall include Lord Keeper of the Great Seal.

"The High Court of Chancery" shall include the Lord Chancellor.

"The Court of Appeal in Chancery" shall include the Lord Chancellor as a judge on rehearing or appeal. Act 1873, s. 100.

"London Court of Bankruptcy" shall include the Chief Judge in Bankruptcy.

"The Treasury" shall mean the Commissioners of her Majesty's Treasury for the time being, or any two of them.

"Rules of Court" shall include forms.

"Cause" shall include any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown.

"Suit" shall include action.

"Action" shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court; and shall not include a criminal proceeding by the Crown.

See also O. I. r. 1, *post*, p. 175.

"Plaintiff" shall include every person asking any relief (otherwise than by way of counter-claim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.

"Petitioner" shall include every person making any application to the Court, either by petition, motion, or summons, otherwise than as against any defendant.

"Defendant" shall include every person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings.

"Party" shall include every person served with notice of, or attending any proceeding, although not named on the record.

"Matter" shall include every proceeding in the Court not in a cause.

"Pleading" shall include any petition or summons, and also shall include the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counter-claim of a defendant.

"Judgment" shall include decree.

"Order" shall include rule.

"Oath" shall include solemn affirmation and statutory declaration.

"Crown Cases Reserved" shall mean such questions of

Act 1873, s. 100.

law reserved in criminal trials as are mentioned in the Act of the eleventh and twelfth years of Her Majesty's reign, chapter seventy-eight.

"Pension" shall include retirement and superannuation allowance.

"Existing" shall mean existing at the time appointed for the commencement of this Act.

SUPREME COURT OF JUDICATURE ACT, 1875.

38 & 39 VICT. c. 77.

[NOTE.—*The Sections and parts of Sections printed in Italic type are repealed.*]

An Act to amend and extend the Supreme Court of Judicature Act, 1873. Act 1875.

[11th August, 1875.]

WHEREAS it is expedient to amend and extend the Supreme Court of Judicature Act, 1873:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Sect. 1. Short title, and construction with 36 & 37 Vict. c. 66.

1. This Act shall, so far as is consistent with the tenor thereof, be construed as one with the Supreme Court of Judicature Act, 1873 (in this Act referred to as the principal Act), and together with the principal Act may be cited as the Supreme Court of Judicature Acts, 1873 and 1875, and this Act may be cited separately as the Supreme Court of Judicature Act, 1875.

Sect. 2. Commencement of Act.

2. This Act, except any provision thereof which is declared to take effect before the commencement of this Act, shall commence and come into operation on the 1st day of November, 1875.

Sections 20, 21, *and* 55 *of the principal Act shall not commence or come into operation until the* 1*st day of November,* 1876, *and until the said sections come into operation an appeal may be brought to the House of Lords from any judgment or order of the Court of Appeal herein-*

Act 1875, ss. 2—4.

after mentioned in any case in which any appeal or error might now be brought to the House of Lords or to Her Majesty in Council from a similar judgment, decree, or order of any Court or Judge whose jurisdiction is by the principal Act transferred to the High Court of Justice or the Court of Appeal, or in any case in which leave to appeal shall be given by the Court of Appeal.

This section, except so much of it as fixed the commencement of the Act, is repealed by s. 24 of the Act of 1876, *post*, p. 140. Appeals to the House of Lords are now regulated by that Act and by the Orders of the House made for carrying it into effect, *post*, pp. 673, *et seq.*

Sect. 3. Explanation of 36 & 37 Vict. c. 66, s. 5, as to number of judges.

3. Whereas by section five of the principal Act it is provided as follows: "that if at the commencement of this Act the number of puisne justices and junior barons who shall become Judges of the said High Court shall exceed twelve in the whole, no new Judge of the said High Court shall be appointed in the place of any such puisne justice or junior baron who shall die or resign while such whole number shall exceed twelve, it being intended that the permanent number of Judges of the said High Court shall not exceed twenty-one;" and whereas, having regard to the state of business in the several Courts whose jurisdiction is transferred by the principal Act to the High Court of Justice, it is expedient that the number of Judges thereof should not at present be reduced: Be it enacted, that so much of the said section as is hereinbefore recited shall be repealed.

The Lord Chancellor shall not be deemed to be a permanent Judge of that Court, and the provisions of the said section relating to the appointment and style of the Judges of the said High Court shall not apply to the Lord Chancellor.

By s. 2 of the Act of 1877, *post*, p. 142, the appointment of an additional judge of the High Court was authorised who is attached to the Chancery Division.

By s. 5 of the Act of 1881, *post*, p. 163, the appointment of a new judge in the place of the Master of the Rolls was authorised, and by s. 6 of the same Act, *post*, p. 164, power is given to appoint a new judge to the Chancery Division whenever the number of judges in that Division is reduced by death or otherwise below five.

Sect. 4. Constitution of Court of Appeal.

4. Her Majesty's Court of Appeal, in this Act and in the principal Act referred to as the Court of Appeal, shall be constituted as follows: There shall be five ex-officio Judges thereof, and also so many ordinary Judges *not*

exceeding three at any one time, as Her Majesty shall from time to time appoint. Act 1875, s. 4.

The *ex-officio* judges shall be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer.

The first ordinary judges of the said Court shall be the present Lords Justices of Appeal in Chancery, and such one other person as Her Majesty may be pleased to appoint by Letters Patent. Such appointment may be made either before or after the commencement of this Act, but if made before shall take effect at the commencement of the Act.

The ordinary judges of the Court of Appeal shall be styled *Justices of Appeal.*

The Lord Chancellor may by writing, addressed to the President of any one or more of the following divisions of the High Court of Justice, that is to say, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce, and Admiralty Division, request the attendance at any time, except during the times of the spring or summer circuits, of an additional judge from such division or divisions (not being *ex-officio* judge or judges of the Court of Appeal), at the sittings of the Court of Appeal, and a judge, to be selected by the division from which his attendance is requested, shall attend accordingly.

Every additional judge, during the time that he attends the sittings of Her Majesty's Court of Appeal, shall have all the jurisdiction and powers of a judge of the said Court of Appeal, but he shall not otherwise be deemed to be a judge of the said Court, or to have ceased to be a judge of the division of the High Court of Justice to which he belongs.

Section fifty-four of the principal Act is hereby repealed, and instead thereof the following enactment shall take effect: No judge of the said Court of Appeal shall sit as a judge on the hearing of an appeal from any judgment or order made by himself, or made by any Divisional Court of the High Court of which he was and is a member.

Whenever the office of an ordinary judge of the Court of Appeal becomes vacant a new judge may be appointed thereto by Her Majesty by Letters Patent.

By s. 4 of the Great Seal Act, 1880 (43 & 44 Vict. c. 10), the mode of passing Letters Patent for the appointment of judges of the Court of Appeal is prescribed as follows:

S. 4. Whereas by the Supreme Court of Judicature Act, 1875,

Act 1875, ss. 4 - 6.

and the Appellate Jurisdiction Act, 1876, ordinary judges of Her Majesty's Court of Appeal are to be appointed by Her Majesty by Letters Patent, but no provision is made respecting the mode of passing such Letters Patent: Be it therefore enacted as follows:

The Letters Patent for appointing an ordinary judge of Her Majesty's Court of Appeal shall be passed in the same manner in which Letters Patent for appointing the judges of Her Majesty's High Court of Justice are passed under the Great Seal.

As to the jurisdiction of the Court of Appeal, see ss. 18 and 19 of the principal Act, *ante*, p. 12, and note thereto. As to the practice on appeals, see O. LVIII., *post*, p. 417, and notes thereto.

The words in this section limiting the number of ordinary judges of the Court of Appeal to three are repealed by s. 15 of the Act of 1876, *post*, p. 134. That section fixes the limit at six.

By s. 2 of the Act of 1881, *post*, p. 162, the Master of the Rolls is made a judge of appeal only, and by s. 3 an existing vacancy is not to be filled up, and the number of ordinary judges of the Court of Appeal is henceforth to be five; and by s. 4 the President of the Probate, &c., Division is made an *ex-officio* member of the Court of Appeal.

By s. 19 of the Act of 1876 it is provided, that "where a judge of the High Court of Justice has been requested to attend as an additional judge at the sittings of the Court of Appeal under s. 4 of the Supreme Court of Judicature Act, 1873 (*sic*), such judge shall, although the period has expired during which his attendance was requested, attend the sittings of the Court of Appeal for the purpose of giving judgment or otherwise in relation to any case which may have been heard by the Court of Appeal during his attendance on the Court of Appeal."

By s. 4 of the Act of 1877, *post*, p. 143, the style of the ordinary judges of the Court of Appeal is "Lords Justices of Appeal."

By s. 11 of the Act of 1881, *post*, p. 166, a judge who was not present and acting as a member of a Divisional Court whose judgment is appealed from is not to be deemed a member of that Court for the purposes of this section.

Sect. 5.

Tenure of office of judges, and oaths of office. Judges not to sit in the House of Commons.

5. All the judges of the High Court of Justice, and of the Court of Appeal respectively, with the exception of the Lord Chancellor, shall hold their offices as such judges respectively during good behaviour, subject to a power of removal by Her Majesty, on an address presented to Her Majesty by both Houses of Parliament. No judge of either of the said Courts shall be capable of being elected to or of sitting in the House of Commons. Every person appointed after the passing of this Act to be judge of either of the said Courts (other than the Lord Chancellor), when he enters on the execution of his office, shall take in the presence of the Lord Chancellor, the oath of allegiance, and judicial oath as defined by the Promissory Oaths Act, 1868. The oaths to be taken by the Lord Chancellor shall be the same as heretofore.

Sect. 6.

6. The Lord Chancellor shall be President of the Court

of Appeal; the other *ex-officio* judges of the Court of Appeal shall rank in the order of their present respective official precedence. The ordinary judges of the Court of Appeal, if not entitled to precedence as Peers or Privy Councillors, shall rank according to the priority of their respective appointments as such judges.

Act 1875, ss. 6—8.

Precedence of judges.

The judges of the High Court of Justice who are not also judges of the Court of Appeal shall rank next after the judges of the Court of Appeal, and, among themselves (subject to the provisions in the principal Act contained as to existing judges), according to the priority of their respective appointments.

Sect. 7. Jurisdiction of Lords Justices in respect of lunatics.

7. Any jurisdiction usually vested in the Lords Justices of Appeal in Chancery, or either of them, in relation to the persons and estates of idiots, lunatics, and persons of unsound mind, shall be exercised by such judge or judges of the High Court of Justice or Court of Appeal as may be intrusted by the sign manual of Her Majesty or Her successors with the care and commitment of the custody of such persons and estates; and all enactments referring to the Lords Justices as so intrusted shall be construed as if such judge or judges so intrusted had been named therein instead of such Lords Justices: Provided that each of the persons who may at the commencement of the principal Act be Lords Justices of Appeal in Chancery shall, during such time as he continues to be a judge of the Court of Appeal, and is intrusted as aforesaid, retain the jurisdiction vested in him in relation to such persons and estates as aforesaid.

See s. 17 of the Act of 1873, *ante*, p. 10.

Sect. 8. Admiralty judges and registrar.

8. Whereas, by section eleven of the principal Act, it if provided as follows: "Every existing judge who is by this Act made a judge of the High Court of Justice, or an ordinary judge of the Court of Appeal shall, as to tenure of office, rank, title, salary, pension, patronage, and powers of appointment or dismissal, and all other privileges and disqualifications, remain in the same condition as if this Act had not passed; and, subject to the change effected in their jurisdiction and duties by or in pursuance of the provisions of this Act, each of the said existing judges shall be capable of performing and liable to perform all duties which he would have been capable of performing or liable to perform in pursuance of any Act of Parliament, law, or custom, if this Act had not passed. No judge appointed before the passing

Act 1875, s. 8.

of this Act shall be required to act under any commission of assize, nisi prius, oyer and terminer, or gaol delivery, unless he was so liable by usage or custom at the commencement of this Act:"

And whereas the Judge of the High Court of Admiralty is by the principal Act appointed a judge of the High Court of Justice:

And whereas such judge is, as to salary and pension, inferior in position to the other puisne judges of the superior courts of common law, but holds certain ecclesiastical and other offices, in addition to the office of Judge of the High Court of Admiralty:

And whereas it is expedient that such judge, if he be willing to relinquish such other offices, should be placed in the same position as to rank, salary, and pension, as the other puisne judges of the superior courts of common law:

Be it enacted that—

If the existing Judge of the High Court of Admiralty under his hand signifies to the Lord Chancellor in writing, before the commencement of the principal Act, that he is willing to relinquish such other offices as aforesaid, and does, before the commencement of the principal Act, resign all other offices of emolument held by him, except the office of Judge of the High Court of Admiralty, he shall, from and after the commencement of the principal Act, be entitled to the same rank, salary, and pension, as if he had been appointed a judge of the High Court of Justice immediately on the commencement of the principal Act, with this addition, that, in reckoning service for the purposes of his pension his service as a Judge of the High Court of Admiralty shall be reckoned in the same manner as if the High Court of Justice had been established at the time of his accepting the office of Judge of the High Court of Admiralty, and he had continued from such time to be a judge of the said High Court of Justice.

The present holder of the office of registrar of Her Majesty in Ecclesiastical and Admiralty causes shall, as respects any appeals in which he would otherwise be concerned coming within the cognizance of the Court of Appeal, be deemed to be an officer attached to the Supreme Court; and the office, so far as respects the duties in relation to such appeals as aforesaid, shall be deemed to be a separate office within the meaning of section seventy-seven of the principal Act, and may be dealt with accordingly. He shall be entitled, in so far as

he sustains any loss of emoluments by or in consequence of the principal Act or this Act, to prefer a claim to the Treasury in the same manner as an officer paid out of fees whose emoluments are affected by the passing of the principal Act is entitled to do under section eighty of the principal Act. Act 1875, ss. 8, 9.

Subject as aforesaid, the person who is, at the time of the passing of this Act, registrar of Her Majesty in Ecclesiastical and Admiralty causes, shall, notwithstanding anything in the principal Act or this Act, have the same rank and hold his office upon the same tenure and upon the same terms and conditions as heretofore; but it shall be lawful for Her Majesty, by Order in Council made upon the recommendation of the Lord Chancellor, with the concurrence of the Treasury, to make, notwithstanding anything contained in any Act of Parliament, such arrangements with respect to the duties of the said last-mentioned office, either by abolition thereof or otherwise, as to Her Majesty may seem expedient: Provided that such Order shall not take effect during the continuance in such office of the said person so being registrar at the time of the passing of this Act, without his assent.

Every Judge of the Probate, Divorce, and Admiralty Division of the said High Court of Justice appointed after the passing of this Act shall, so far as the state of business in the said Division will admit, share with the judges mentioned in section thirty-seven of the principal Act the duty of holding sittings for trials by jury in London and Middlesex and sittings under commissions of assize, oyer and terminer, and gaol delivery.

See s. 11 of the Act of 1873, *ante*, p. 6.

Sect. 9. London Court of Bankruptcy not to be transferred to High Court of Justice.

9. The London Court of Bankruptcy shall not be united or consolidated with the Supreme Court of Judicature, and the jurisdiction of that Court shall not be transferred under the principal Act to the High Court of Justice, but shall continue the same in all respects as if such transfer had not been made by the principal Act, and the principal Act shall be construed as if such union, consolidation, and transfer had not been made: Provided that—

(1.) The office of Chief Judge in Bankruptcy shall be filled by such one of the judges of the High Court of Justice appointed since the passing of the Bankruptcy Act, 1869, or, with his consent,

Act 1875, ss. 9, 10.

of such one of the judges appointed prior to the passing of the last-mentioned Act, as may be appointed by the Lord Chancellor to that office; and

(2.) The appeal from the London Court of Bankruptcy shall lie to the Court of Appeal, in accordance with the principal Act.

See ss. 3, 16, and 18 of the Act of 1873, *ante*, pp. 2, 9, 12, and notes thereto; and as to the practice on appeals, see O. LVIII., *post*, p. 417.

Sect. 10. Amendment of 36 & 37 Vict. c. 66, s. 25, as to rules of law upon certain points, administration and winding-up proceedings.

10. Whereas, by section twenty-five of the principal Act, after reciting that it is expedient to amend and declare the law to be thereafter administered in England as to the matters next thereinafter mentioned, certain enactments are made with respect to the law, and it is expedient to amend the said section: Be it therefore enacted as follows:—

Sub-section one of clause twenty-five of the principal Act is hereby repealed, and instead thereof the following enactment shall take effect; (that is to say,) in the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such company, may come in under the decree or order for the administration of such estate, or under the winding up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act.

In sub-section seven of the said section the reference to the date of the passing of the principal Act shall be deemed to refer to the date of the commencement of the principal Act.

The sub-section of the principal Act now repealed assimilated

Act 1875, s. 10.

Administration and winding-up.

the Chancery rule as to the rights of secured creditors in case of insolvency to that in force in Bankruptcy; but it left the rule in winding up, which was the same as the Chancery rule, unaffected. The new rule places all the cases upon the same footing.

This section which supersedes sub-s. 1 of s. 25 of the Act of 1873, came into force on the 1st November, 1875. It is not retrospective in its operation: *Re Joseph Suche & Co.*, 1 Ch. D. 48, M. R.; *Sherwin* v. *Selkirk*, 12 Ch. D. 68, C. A.

Before this section came into force, the rule in winding up proceedings was that a secured creditor was entitled to prove for the full amount of his debt and not merely for the balance after realizing or valuing his security: *Kellock's Case*, 3 L. R. Ch. 769. But now that the bankruptcy rule is applied he can only prove for the balance: *Re Withernsea Brickworks*, 16 Ch. D. at p. 343, C. A.

The section deals with two distinct subjects, namely the administration of the estates of deceased persons dying insolvent, and winding up proceedings, but, for the most part, the same considerations apply to them both.

This section does not apply to or affect an executor's right of retainer, nor does the existence of a right of retainer make him a secured creditor within it: *Lee* v. *Nuttal*, 12 Ch. D. 61, C. A.; nor does the section affect the priority of a judgment creditor. A judgment creditor who has obtained but not served a garnishee order *nisi* against the debtor of a company, before any petition to wind it up has been presented, is not a secured creditor at the time of the commencement of the winding up: *Re Stanhope Silkstone Collieries Co.*, 11 Ch. D. 160, C. A.; *Smith* v. *Morgan*, 5 C. P. D. 337. This section does not apply to administration proceedings the bankruptcy rules as to the effect of non-registration of bills of sale: *In re Knott*, 7 Ch. D. 549, n.: see at p. 550.

But this section does apply and incorporate the rules of bankruptcy as to proof of contingent liabilities: *Re Bridges*, 17 Ch. D. 343; and the rules as to valuation (Bankruptcy Rules 99, 109, 111) when a secured creditor seeks to prove for a balance: *Williams* v. *Hopkins*, 18 Ch. D. 370, C. A.; but see *Re Carmarthenshire Anthracite Coal Co.*, 45 L. J. Ch. 200; and *Re Kit Hill Tunnel*, 16 Ch. D. 590. So too it imports the provisions of s. 31 of the Bankruptcy Act, 1869, which enable a creditor to prove in respect of a liability existing at the time of adjudication and which ripens into a debt during the bankruptcy. Therefore the holder of a fire policy was allowed to prove for the full amount of the policy against the company which was being wound up, although the fire took place after the winding-up order had been made: *Re Northern Counties of England Insurance Co.*, 17 Ch. D. 337, M. R. As regards s. 32 of the Bankruptcy Act, 1869, which gives priority to certain debts, it has been held by Malins, V.-C., in *Re Association of Land Financiers*, 16 Ch. D. 373, and by Jessel, M.R., in *Re Norton Iron Works Co.*, 26 W. R. 53, that sub-s. 2, which gives priority to wages of clerks or servants over other debts is imported into administration and winding up proceedings; while it has been held by Malins, V.-C., in *Re Regent United Service Stores*, 38 L. T. 130 (reversed on appeal on another ground, 8 Ch. D. 616), and by Jessel, M. R., in *Re Albion Steel and Wire Co.*, 7 Ch. D. 547, that sub-s. 1, which gives priority to Queen's taxes and parochial and other rates over other debts, is not imported into administration and winding up proceedings. It seems impossible to reconcile the decisions on the two sub-sections.

Act 1875, s. 10, 11.

Administration and winding-up.

This section does not import into winding up proceedings the provisions of s. 6 of the Bankruptcy Act, 1869, relating to petitioning creditors: *Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681, M. R.; nor the provisions of s. 34 of that Act as to the landlord's right of distress for one year's rent, for s. 34 does not make the landlord a secured creditor: *Thomas* v. *Patent Lionite Co.*, 17 Ch. D. 250, C. A., affirming Malins, V.-C., in *Re Coal Consumers' Association*, 4 Ch. D. 625, and Hall, V.-C., in *Re Bridgewater Engineering Co.*, 12 Ch. D. 181; nor the provisions of s. 87 as to the sheriff holding for fourteen days the proceeds of goods taken in execution: *Re Witherusea Brickworks*, 16 Ch. D. 337, C. A., affirming Fry, J., in *Re Richards & Co.*, 11 Ch. D. 676, and Hall, V.-C., in *Ex parte Railway Steel and Plant Co.*, 8 Ch. D. 184, and overruling Jessel, M. R., in *Re Printing and Numerical Registering Co.*, 8 Ch. D. 535, and Bacon, V.-C., in *Re Stockton Iron Furnace Co.*, 10 Ch. D. 335, reversed on appeal on another ground, 10 Ch. D. 349, C. A.; nor the power of disclaimer given by s. 23 of the Bankruptcy Act, 1869: In *Re Westbourne Grove Drapery Co.*, 5 Ch. D. 248; nor the rules in bankruptcy as to reputed ownership and fraudulent preference: *Re Cramlin Viaduct Works Co.*, 11 Ch. D. 755, M. R.; see too *Re Witherusea Brickworks Co.*, 16 Ch. D. at 341 per James, L. J.

It seems to follow from the decisions in *Gill's Case*, 12 Ch. D. 755, Bacon, V.-C., *Re Whitehouse*, 9 Ch. D. 595, M. R., and *Ex parte Branwhite*, 48 L. J. Ch. 463, Fry, J., that the mutual credit rules in bankruptcy are not imported by this section, but see a contrary opinion expressed by Bacon, V.-C., in *Campbell's Case*, 4 Ch. D. 475.

The discretion given by s. 87 of the Companies Act, 1862, to the Court to give leave to a judgment creditor who has seized but has not realized at the date of the winding up order to proceed with his execution is not affected by this section: *Re Taylor*, 8 Ch. D. 183, Hall, V.-C.

This section does not affect the rule in winding up entitling a creditor who is also a shareholder in the company to receive a dividend on his debt if he has paid all calls made when the dividend was declared: *Re West of England Bank*, 12 Ch. D. 823, Fry, J.

Under this section judgment for administration is equivalent to adjudication in bankruptcy, and therefrom a creditor whose debt bears interest, is entitled only to interest up to the date of judgment and not up to the date of payment: *Boswell* v. *Gurney*, 13 Ch. D. 136 M. R.

Sect. 11.

Provision as to option for any Plaintiff (subject to rules) to choose in what division he will sue—in substitution for 36 & 37 Vict. c. 66, s. 35.

11. Subject to any Rules of Court and to the provisions of the principal Act and this Act and to the power of transfer, every person by whom any cause or matter may be commenced in the said High Court of Justice shall assign such cause or matter to one of the divisions of the said High Court as he may think fit, by marking the document by which the same is commenced with the name of such division, and giving notice thereof to the proer officer of the court; Provided that—

(1.) All interlocutory and other steps and proceedings in or before the said High Court in any cause or

matter subsequent to the commencement thereof, shall be taken (subject to any Rules of Court and to the power of transfer) in the division of the said High Court to which such cause or matter is for the time being attached; and Act 1875, s. 11, 12.

(2.) If any plaintiff or petitioner shall at any time assign his cause or matter to any division of the said High Court to which, according to the Rules of Court, or the provisions of the principal Act or this Act, the same ought not to be assigned, the Court, or any judge of such division, upon being informed thereof, may, on a summary application at any stage of the cause or matter, direct the same to be transferred to the division of the said Court to which, according to such rules or provisions, the same ought to have been assigned, or he may, if he think it expedient so to do, retain the same in the division in which the same was commenced; and all steps and proceedings whatsoever taken by the plaintiff or petitioner, or by any other party in any such cause or matter, and all orders made therein by the Court or any judge thereof before any such transfer shall be valid and effectual to all intents and purposes in the same manner as if the same respectively had been taken and made in the proper division of the said Court to which such cause or matter ought to have been assigned; and

(3.) Subject to Rules of Court, a person commencing any cause or matter shall not assign the same to the Probate, Divorce, and Admiralty Division, unless he would have been entitled to commence the same in the Court of Probate, or in the Court for Divorce and Matrimonial causes, or in the High Court of Admiralty, if this Act had not passed.

See as to choice of Division, O. V., rr. 4, *et seq.*, *post*, p. 193, and note thereto. As to transfer, see O. LI., *post*, p. 388, as to the assignment of particular subjects to particular divisions of the High Court, see s. 34 of the Act of 1873, *ante*, p. 47. See also s. 16, *ante*, p. 9, and note thereto.

Sect. 12. Sittings of Court of Appeal.

12. Every appeal to the Court of Appeal shall, where the subject-matter of the appeal is a final order, decree, or judgment, be heard before not less than three judges of the said Court sitting together, and shall, when the subject-matter of the appeal is an interlocutory order,

Act 1875, s. 12.

decree, or judgment, be heard before not less than two judges of the said Court sitting together.

Interlocutory or final orders.

Any doubt which may arise as to what decrees, orders, or judgments are final, and what are interlocutory, shall be determined by the Court of Appeal.

Subject to the provisions contained in this section the Court of Appeal may sit in two divisions at the same time.

By s. 100 of the Act of 1873, "order" shall include rule.

As to the jurisdiction of the Court of Appeal, see ss. 18 and 19 of the Act of 1873, *ante*, p. 12, and note thereto; and as to the practice upon appeals see O. LVIII., *post*, p. 417, and notes thereto.

It is not always easy to determine what judgments or orders are interlocutory and what are final. The distinction is important for three reasons.

1. An appeal from an interlocutory order can be heard by two judges under this section. As to this, see the Memorandum of Practice, 10th November, 1876, cited 1 Ch. D. 41, specifying what appeals should be heard before three judges, and the comments of James, L.J., thereon, in *Pheysey* v. *Pheysey*, 12 Ch. D. at p. 307, C.A.

2. The time for appealing from an interlocutory order is twenty-one days, while the time for appealing from a final order in an action is one year: see O. LVIII., r. 15, *post*, p. 427.

3. By O. XXXVII., r. 3, *post*, p. 343, affidavits on interlocutory motions may extend to matters of information and belief instead of being confined to matters which the deponent is able of his own knowledge to prove; and by O. LVIII., r. 5, *post*, p. 421, further evidence may be given upon interlocutory appeals to the Court of Appeal without special leave.

In determining whether a judgment or order is interlocutory, for purposes of time, the form of the proceeding must be looked at: *White* v. *Witt*, 5 Ch. D. at 591, C. A., per Jessel, M. R. The following have been held to be interlocutory, namely: An order to vary a Chief Clerk's certificate; and it is immaterial that the order is included in an order on further consideration which is final: *Cummins* v. *Heron*, 4 Ch. D. 787, C. A.; *White* v. *Witt*, 5 Ch. D. 589, C. A.; see however *Laird* v. *Briggs*, 16 Ch. D. 663, C. A., cited below. An order on a creditor's claim in an administration suit: *Traill* v. *Jackson*, 4 Ch. D. 7, C. A.; and see *Pheysey* v. *Pheysey*, 12 Ch. D. 305, C. A. An order made on an application that a case should be tried with a jury: *Swindell* v. *Birmingham Syndicate*, 3 Ch. D. 127, C. A. An order making a rule absolute for a new trial: *Highton* v. *Treherne*, 48 L. J. Ex. 167, C.A. An order discharging a rule for a new trial: *Wilks* v. *Judge*, W. N. 1880, p. 98, C.A. An order empowering the plaintiff to sign judgment on a specially indorsed writ under O. XIV.: *Standard Discount Co.* v. *La Grange*, 3 C. P. D. 67, C. A. An order for judgment on an interpleader issue: *McAndrew* v. *Barker*, 7 Ch. D. 701, C. A. An order on a motion to vary a special referee's report: *Dunkirk Colliery Co.* v. *Lever*, 26 W. R. 841, C. A. A judgment upon a special case stated by an arbitrator who is thereupon to make his award: *Collins* v. *Vestry of Paddington*, 5 Q. B. D. 368, C. A. The findings of a judge on issues of fact tried separately from the rest of the action: *Krehl* v. *Burrel*, 10 Ch. D. 420, C. A., as explained by *Dollman* v. *Jones*, 12 Ch. D. 553, C. A.; but see *Potter* v. *Cotton*, 5 Ex. D., 138, C. A., at p. 139.

Act 1875, ss. 12, 13.

Interlocutory or final orders.

But a judgment allowing or overruling a demurrer is final: *Trowell* v. *Shenton*, 8 Ch. D. 318, C. A., and see *Collins* v. *Vestry of Paddington*, 5 Q. B. D. at 370, C. A. So too is an order dismissing an action. See *International Financial Society* v. *City of Moscow Gas Co.*, 7 Ch. D. 241, C. A., and *Whistler* v. *Hancock*, 3 Q. B. D. 83; and so, too, is an order for judgment for part of the claim under O. XL. r. 11: see *Att.-Gen.* v. *Great Eastern Railway*, 48 L. J. Ch. 429, C. A. See further, *Re Stockton Iron Co.*, 10 Ch. D. 335, C. A., as to winding up; *Marsden* v. *Lancashire and Yorkshire Railway*, 7 Q. B. D. 641, C.A., as to costs at trial.

Under s. 25, sub-s. 8, of the Act of 1873, which enables a receiver to be appointed by an "interlocutory order," it was held that, after final judgment, a creditor might have a receiver appointed in order to obtain equitable execution: *Smith* v. *Cowell*, 6 Q. B. D. 75 (C. A.).

Where a party at the trial applied for leave to amend, which was refused and judgment was subsequently given against him, it was held that an appeal from the judgment included an appeal from the order refusing leave to amend and that no separate appeal from such order was necessary: *Laird* v. *Briggs*, 16 Ch. D. 663, C. A. See, however, *Cummins* v. *Heron*, 4 Ch. D. 787, C. A., cited above.

By O. LVIII. r. 14, *post*, p. 427, no interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as shall seem just.

Sect. 13.

Amendment of s. 60 of 36 & 37 Vict. c. 66 as to district registrars.

13. Whereas by section sixty of the principal Act it is provided that for the purpose of facilitating the prosecution in country districts of legal proceedings, it shall be lawful for Her Majesty by Order in Council from time to time to direct that there shall be district registrars in such places as shall be in such Order mentioned for districts to be thereby defined; and whereas it is expedient to amend the said section: Be it therefore enacted that—

Where any such Order has been made, two persons may, if required, be appointed to perform the duties of district registrar in any district named in the Order, and such persons shall be deemed to be joint district registrars, and shall perform the said duties in such manner as may from time to time be directed by the said Order, or any Order in Council amending the same.

Moreover the registrar of any inferior court of record having jurisdiction in any part of any district defined by such Order (other than a County Court), shall, if appointed by Her Majesty, be qualified to be a district registrar for the said district, or for any and such part thereof as may be directed by such Order, or any Order amending the same.

Every district registrar shall be deemed to be an officer of the Supreme Court, and be subject accordingly to

Act 1875, ss. 13—16.

the jurisdiction of such Court, and of the divisions thereof.

Appointment of deputy by district registrar.

By s. 22 of the Act of 1876: "A district registrar of the Supreme Court of Judicature may from time to time, but in each case with the approval of the Lord Chancellor, and subject to such regulations as the Lord Chancellor may from time to time make, appoint a deputy, and all acts authorized or required to be done by, to, or before a district registrar may be done by, to, or before any deputy so appointed; provided always, that in no case such appointment shall be made for a period exceeding three months. This section shall come into force at the time of the passing of this Act."

As to the appointment of District Registrars and their districts, see ss. 60, *et seq.*, of the Act of 1873, *ante*, p. 55, and notes thereto. As to proceedings in District Registries, see O. V., r. 1, *post*, p. 191, and note thereto; O. XII., rr. 1 to 5, *post*, p. 210; O. XXXV., *post*, p. 308, and notes thereto, and O. LIV., r. 2a, *post*, p. 401.

Sect. 14.

Amendment of 36 & 37 Vict. c. 66, s. 87, as to enactments relating to attorneys.

14. Whereas under section eighty-seven of the principal Act, solicitors and attorneys will after the commencement of that Act be called solicitors of the Supreme Court: Be it therefore enacted that—

The registrar of attorneys and solicitors in England shall be called the registrar of solicitors, and the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron, or any two of them, may, from time to time, by regulation adapt any enactments relating to attorneys, and any declaration, certificate or form required under those enactments to the solicitors of the Supreme Court under section eighty-seven of the principal Act.

See s. 87 of the Act of 1873, *ante*, p. 87, and note thereto.

Sect. 15.

Appeal from inferior court of record.

15. It shall be lawful for Her Majesty from time to time, by Order in Council, to direct that the enactments relating to appeals from county courts shall apply to any other inferior court of record; and those enactments, subject to any exceptions, conditions, and limitations contained in the Order, shall apply accordingly, as from the date mentioned in the Order.

As to appeals from County Courts see s. 45 of the principal Act, *ante*, p. 55, and note thereto.

Sect. 16.

Rules in 1st schedule,—

Institution 36 &

16. The Rules of Court in the first schedule to this Act shall come into operation at the commencement of this Act, and as to all matters to which they extend shall thenceforth regulate the proceedings in the High Court of

Justice and Court of Appeal. But such Rules of Court and also all such other Rules of Court (if any) as may be made after the passing and before the commencement of this Act under the authority of the next section may be annulled or altered by the authority by which new Rules of Court may be made after the commencement of this Act.

Act 1875, ss. 16, 17.

37 Vict. c. 66, s. 69, and schedule.

See note to next section.

17. Her Majesty may at any time after the passing and before the commencement of this Act, by Order in Council, made upon the recommendation of the Lord Chancellor, and the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and the Lords Justices of Appeal in Chancery, or any five of them, and the other judges of the several Courts intended to be united and consolidated by the principal Act as amended by this Act, or of a majority of such other Judges, make any further or additional Rules of Court for carrying the principal Act and this Act into effect, and in particular for all or any of the following matters, so far as they are not provided for by the Rules in the first Schedule to this Act; that is to say,

Sect. 17. Provision as to making &c., of Rules of Court before or after the commencement of the Act,—in substitution for 36 & 37 Vict. c. 66, ss. 68, 69, 74, and schedule.

(1.) For regulating the sittings of the High Court of Justice and the Court of Appeal, and of any Divisional or other Courts thereof respectively, and of the Judges of the said High Court sitting in Chambers; and

(2.) For regulating the pleading, practice, and procedure in the High Court of Justice and Court of Appeal; and

(3.) Generally, for regulating any matters relating to the practice and procedure of the said Courts respectively, or to the duties of the officers thereof, or of the Supreme Court, or to the costs of proceedings therein.

From and after the commencement of this Act, the Supreme Court may at any time, with the concurrence of a majority of the Judges thereof present at any meeting for that purpose held (of which majority the Lord Chancellor shall be one), alter and annul any Rules of Court for the time being in force, and have and exercise the same power of making Rules of Court as is by this section vested in Her Majesty in Council on the recommendation of the said Judges before the commencement of this Act.

In substitution for 36 & 37 Vict. c. 66, s. 74.

Act 1875, s. 17.

All Rules of Court made in pursuance of this section shall be laid before each House of Parliament within such time and shall be subject to be annulled in such manner as is in this Act provided.

All Rules of Court made in pursuance of this section, if made before the commencement of this Act, shall from and after the commencement of this Act, and if made after the commencement of this Act, shall from and after they come into operation, regulate all matters to which they extend, until annulled or altered in pursuance of this section.

The reference to certain Judges in section twenty-seven of the principal Act shall be deemed to refer to the Judges mentioned in this section as the Judges on whose recommendation an Order in Council may be made.

By s. 100 of the Act of 1873, "Rules of Court shall include forms."

Rule Committee.

By s. 17 of the Act of 1876, the constitution of the Rule Committee is altered, and, finally, by s. 19 of the Act of 1881, *post*, p 169, the power to make rules is vested in any five or more of the following persons, of whom the Lord Chancellor must be one, namely: The Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Probate Division, and four other judges of the Supreme Court to be nominated in writing by the Lord Chancellor.

Rules.

As to laying rules of Court before Parliament in pursuance of the directions in this section (s. 17), see s. 25 of this Act, *post*, p. 116.

The jurisdiction to make rules is marked out by numerous sections of which the present is the most important. The enactments which give general powers or are of general application, are the following:—

s. 16 of this Act, *supra*, p. 108, brings into operation the rules in the first schedule thereto, and gives power to alter or annul them by rule.

The present section gives general powers to regulate sittings, pleading, practice, procedure, costs, and the duties of officers.

s. 24 of this Act, *post*, p. 115, gives power to regulate by rules the payment of money into or out of court.

s. 22 of the Act of 1879 (the Officers' Act) gives power to make rules for the purposes of that Act; and further enacts, that when any Act authorises or directs rules to be made to carry out its provisions, the provisions of s. 17 of the Act of 1875 shall extend to those rules. See also ss. 12, 24, 26, 27 of the Act of 1879, *post*, pp. 147, 152.

s. 6 of the Statute Law Revision and Civil Procedure Act, 1881 (44 & 45 Vict. c. 59), extends the power to make rules given by s. 17 of the Act of 1875 to all proceedings by or against the Crown.

s. 19 of this Act, *post*, p. 111, preserves the existing practice and procedure in criminal matters subject to Rules of Court.

s. 18 of this Act, *post*, p. 111, preserves the powers of the President of the Probate and Divorce Division to make rules in divorce

and probate matters under the authority given by the 20 & 21 Vict. c. 77, s. 30, and the 20 & 21 Vict. c. 85, s. 53. **Act 1875, ss. 17—19.**

s. 16 of the Act of 1876, *post*, p. 136, gives power to the President of the Court of Appeal, with the concurrence of three judges of appeal, to make regulations as to the sittings of the Court of Appeal. **Rules.**

Rules of Court made under the Judicature Acts referred to have statutory force, and supersede all enactments prior to the Judicature Acts which are in any way inconsistent with such Rules of Court; for instance, O. LV. as to costs supersedes and impliedly repeals the 21 Jac. 1, c. 16 as to costs in slander where less than 40*s.* is recovered: *Garnett* v. *Bradley*, 3 App. Cas. 944, H. L.; but it seems that Rules of Court cannot override or vary the provisions of the Judicature Acts themselves: see *Longman* v. *East*, 3 C. P. D. 142, C. A.

As to regulations concerning accounts kept with the Bank of England, see s. 24, *post*, p. 124, and as to the regulation of court fees and their collection, see s. 26, *post*, p. 116, and note thereto.

Sect. 18. Provision as to Rules of Probate, Divorce, and Admiralty Courts, being Rules of the High Court,—in substitution for 36 & 37 Vict. c. 66, s. 70.

18. All Rules and Orders of Court in force at the time of the commencement of this Act in the Court of Probate, the Court for Divorce and Matrimonial Causes, and the Admiralty Court, or in relation to appeals from the Chief Judge in Bankruptcy, or from the Court of Appeal in Chancery in bankruptcy matters, except so far as they are expressly varied by the first Schedule hereto or by Rules of Court made by Order in Council before the commencement of this Act, shall remain and be in force in the High Court of Justice and in the Court of Appeal respectively, until they shall respectively be altered or annulled by any Rules of Court made after the commencement of this Act.

The present Judge of the Probate Court and of the Court for Divorce and Matrimonial Causes shall retain, and the president for the time being of the Probate and Divorce Division[1] of the High Court of Justice shall have, with regard to non-contentious or common form business in the Probate Court, the powers now conferred on the Judge of the Probate Court by the thirtieth section of the twentieth and twenty-first years of Victoria, chapter seventy-seven, and the said Judge shall retain, and the said president shall have, the powers as to the making of rules and regulations conferred by the fifty-third section of the twentieth and twenty-first years of Victoria, chapter eighty-five.

[1] *Sic.*

See note to last section, and see *Re Baum*, 9 Ch. D. 271, C. A., as to the old bankruptcy rules as to appeals.

Sect. 19. Provision as to criminal procedure,

19. Subject to the First Schedule hereto and any Rules of Court to be made under this Act, the practice and procedure in all criminal causes and matters whatsoever

Act 1875, ss. 19—21.

in the High Court of Justice and in the Court of Appeal respectively, including the practice and procedure with respect to Crown Cases Reserved, shall be the same as the practice and procedure in similar causes and matters before the commencement of this Act.

subject to future Rules remaining unaltered,—in substitution for 36 & 37 Vict. c. 66, s. 71.

See ss. 19 and 47 of the Act of 1873, *ante*, pp. 12, 58, and notes thereto.

Sect. 20.

Provision as to Act not affecting rules of evidence or juries,—in substitution for 36 & 37 Vict. c. 66, s. 72.

20. Nothing in this Act or in the First Schedule hereto, or in any Rules of Court to be made under this Act, save as far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read, shall affect the mode of giving evidence by the oral examination of witnesses in trials by jury, or the rules of evidence, or the law relating to jurymen or juries.

See *ante*, p. 73. As to evidence generally see O. XXXVII. and O. XXXVIII., *post*, pp. 342, 347, and notes thereto.

Sect. 21.

Provision for saving of existing procedure of Courts when not inconsistent with this Act or rules of Court,—in substitution for 36 & 37 Vict. c. 66, s. 73.

21. Save as by the principal Act or this Act, or by any Rules of Court, may be otherwise provided, all forms and methods of procedure which at the commencement of this Act were in force in any of the Courts whose jurisdiction is by the principal Act or this Act transferred to the said High Court and to the said Court of Appeal respectively, under or by virtue of any law, custom, general order, or rules whatsoever, and which are not inconsistent with the principal Act or this Act or with any Rules of Court, may continue to be used and practised, in the said High Court of Justice and the said Court of Appeal respectively, in such and the like cases, and for such and the like purposes, as those to which they would have been applicable in the respective Courts of which the jurisdiction is so transferred, if the principal Act and this Act had not passed.

Where the Act and Rules contain no provision in point, and there was a variance between the practice of the Common Law and Chancery Courts, that practice which appears on the whole most convenient will now be adopted: *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong*, 13 Ch. D. 310, C. A. For instance, where there was a written submission to arbitration, the practice at common law was to make the submission a rule of court, while in equity the award only was made a rule of court. The common law practice is the more convenient of the two, and is to be adopted for the future: *Re Oglesby's Arbitration*, W. N. 1879, p. 188, M. R.; *Jones* v. *Jones*, 14 Ch. D. 593, C. A. In *Le Grange* v. *McAndrew*, 4 Q. B. D. 211, the equity rule as to dismissing an action was followed. See further *Pringle* v. *Gloag*, 10 Ch. D. 676, *Laming* v. *Gee*, 10 Ch. D. 715; *Nurse* v. *Durnford*, 13 Ch. D. 764, as to the survival of the old practice. See further note to s. 25, sub.-s. 11, *ante*, p. 36.

As to the canon of construction for determining when the old practice is inconsistent with the new see *Garnett* v. *Bradley*,

3 App. Cas. 944, H. L., when it was held that O. LV. as to costs was inconsistent with, and superseded the 21 Jac. 1, c. 16, s. 3 as to costs in slander. Act 1875, ss. 21—23.

See further O. I. r. 3, *post*, p. 183, which provides for carrying out this section.

Nothing in principal Act to prejudice right to have issues submitted, &c.

22. Whereas by section forty-six of the principal Act it is enacted that "any Judge of the said High Court sitting in the exercise of its jurisdiction elsewhere than in a Divisional Court, may reserve any case, or any point in a case for the consideration of a Divisional Court, or may direct any case or point in a case to be argued before a Divisional Court:" Be it hereby enacted, that nothing in the said Act, nor in any rule or order made under the powers thereof or of this Act, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the Judge to the jury before whom the same shall come for trial, with a proper and complete direction to the jury upon the law, and as to the evidence applicable to such issues:

Provided also, that the said right may be enforced either by motion in the High Court of Justice or by motion in the Court of Appeal founded upon an exception entered upon or annexed to the record.

See O. XXXVI., r. 22, *post*, p. 327, and notes thereto; s. 17 of the Act of 1876, *post*, p. 136; and O. XL., *post*, p. 354, and notes thereto. Where there was no record, the Court of Appeal ordered notice of motion to be given: *Cheese* v. *Lovejoy*, 2 P. D. 161, C. A.

23. Her Majesty may at any time after the passing of this Act, and from time to time, by Order in Council, provide in such manner and subject to such regulations as to Her Majesty may seem meet for all or any of the following matters:

Sect. 23. Regulation of circuit.

1. For the discontinuance, either temporarily, or permanently, wholly or partially, of any existing circuit, and the formation of any new circuit by the union of any counties or parts of counties, or partly in one way and partly in the other, or by the constitution of any county or part of a county to be a circuit by itself; and in particular for the issue of commissions for the discharge of civil and criminal business in the county of Surrey to the Judges appointed to sit for the trial by jury of causes and issues in Middlesex or London or any of them; and

Act 1875, s. 23.

2. For the appointment of the place or places at which assizes are to be holden on any circuit; and

3. For altering by such authority and in such manner as may be specified in the Order, the day appointed for holding the assizes at any place on any circuit in any case, where, by reason of the pressure of business or other unforeseen cause, it is expedient to alter the same; and

4. For the regulation, so far as may be necessary for carrying into effect any Order under this section, of the venue in all cases, civil and criminal, triable on any circuit or elsewhere.

Her Majesty may from time to time, by Order in Council, alter, add to, or amend any Order in Council, made in pursuance of this section; and in making any Order under this section may give any directions which it appears to Her Majesty to be desirable to give for the purpose of giving full effect to such Order.

Provided that every Order in Council made under this section shall be laid before each House of Parliament within such time, and shall be subject to be annulled in such manner as is in this Act provided.

Any Order in Council purporting to be made in pursuance of this section shall have the same effect in all respects as if it were enacted of this Act.

The power hereby given to Her Majesty shall be deemed to be in addition to and not in derogation of any power already vested in Her Majesty in respect of the matters aforesaid; and all enactments in relation to circuits, or the places at which assizes are to be holden, or otherwise in relation to the subject matter of any Order under this section, shall, so far as such enactments are inconsistent with such Order, be repealed thereby, whether such repeal is thereby expressly made or not; but all enactments relating to the power of Her Majesty to alter the circuits of the Judges, or places at which assizes are to be holden, or the distribution of revising barristers among the circuits, or otherwise enabling or facilitating the carrying the objects of this section into effect, and in force at the time of the passing of the principal Act, shall continue in force, and shall, with the necessary variations, if any, apply, so far as they are applicable, to any alterations in or dealings with circuits, or places at which assizes are to be holden, made or to be made after the passing of this Act, or to any other provisions of any Order made under this section; and if any

such Order is made for the issue of commissions for the discharge of civil and criminal business in the county of Surrey as before mentioned in this section, that county shall, for the purpose of the application of the said enactments, be deemed to be a circuit, and the senior Judge for the time being so commissioned, or such other Judge as may be for the time being designated for that purpose by Order in Council shall, in the month of July or August in every year, appoint the revising barristers for that county, and the cities and boroughs therein.

The expression "assizes" shall in this section be construed to include sessions under any commission of oyer and terminer, or gaol delivery, or any commission in lieu thereof issued under the principal Act.

See s. 29 of the Act of 1873, *ante*, p. 38, and notes thereon.

As to winter assizes, the date of holding them, and the consolidation of counties for the purpose of such assize, see The Winter Assizes Acts, 1876 and 1877 (39 & 40 Vict. c. 57, and 40 & 41 Vict. c. 46), *post*, pp. 697, 699. As to spring assizes, see The Spring Assizes Act, 1879 (42 & 43 Vict. c. 1), *post*, p. 701.

Sect. 24. Additional power as to regulation of practice and procedure by Rules of Court.

24. Where any provisions in respect of the practice or procedure of any Courts the jurisdiction of which is transferred by the principal Act or this Act to the High Court of Justice or the Court of Appeal, are contained in any Act of Parliament, Rules of Court may be made for modifying such provisions to any extent that may be deemed necessary for adapting the same to the High Court of Justice and the Court of Appeal, without prejudice nevertheless to any power of the Lord Chancellor, with the concurrence of the Treasury, to make any Rules with respect to the Paymaster General, or otherwise.

Any provisions relating to the payment, transfer, or deposit into, or in, or out of any Court of any money or property, or to the dealing therewith, shall, for the purposes of this section, be deemed to be provisions relating to practice and procedure.

The Lord Chancellor, with the concurrence of the Treasury, may from time to time, by order, determine to what accounts and how intituled any such money or property as last aforesaid, whether paid, transferred, or deposited before or after the commencement of this Act, is to be carried, and modify all or any forms relating to such accounts; and the Governor and Company of the Bank of England, and all other companies, bodies corporate, and persons, shall make such entries and alterations in their books as may be directed by the Lord Chancellor,

Act 1875, ss. 24—26.

with the concurrence of the Treasury, for the purpose of carrying into effect any such order.

See s. 17, *ante*, p. 109, and note thereto.

Sect. 25. Orders and Rules to be laid before Parliament, and may be annulled on address from either House.

25. Every Order in Council and Rule of Court required by this Act to be laid before each House of Parliament shall be so laid within forty days next after it is made, if Parliament is then sitting, or if not, within forty days after the commencement of the then next ensuing session; and if an address is presented to Her Majesty by either House of Parliament, within the next subsequent forty days on which the said House shall have sat, praying that any such Rule or Order may be annulled, Her Majesty may thereupon, by Order in Council, annul the same; and the Rule or Order so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same.

This section shall come into operation immediately on the passing of this Act.

See s. 17, *ante*, p. 109, and note thereto.

Sect. 26. Fixing and collection of fees in High Court and Court of Appeal.

26. The Lord Chancellor, with the advice and consent of the Judges of the Supreme Court, or any three of them, and with the concurrence of the Treasury, may, either before or after the commencement of this Act, by order, fix the fees and percentages (including the percentage on estates of lunatics) to be taken in the High Court of Justice or in the Court of Appeal, or in any Court created by any commission or in any office which is connected with any of those Courts, or in which any business connected with any of those Courts is conducted, or by any officer paid wholly or partly out of public moneys who is attached to any of those Courts or the Supreme Court, or any Judge of those Courts, including the masters and other officers in lunacy, and may from time to time, by order, increase, reduce, or abolish all or any of such fees and percentages, and appoint new fees and percentages to be taken in the said Courts or offices, or any of them, or by any such officer as aforesaid.

Any order made in pursuance of this section shall be binding on all the Courts, offices, and officers to which it refers, in the same manner as if it had been enacted by Parliament.

All such fees and percentages shall (save as otherwise

directed by the order) be paid into the receipt of Her Majesty's Exchequer, and be carried to the Consolidated Fund, and with respect thereto the following rules shall be observed: Act 1875, s. 26.

(1.) The fees and percentages shall, except so far as the order may otherwise direct, be taken by stamps, and if not taken by stamps shall be taken, applied, accounted for, and paid over in such manner as may be directed by the order.

(2.) Such stamps shall be impressed or adhesive, as the Treasury from time to time direct.

(3.) The Treasury, with the concurrence of the Lord Chancellor, may from time to time make such rules as may seem fit for publishing the amount of the fees and regulating the use of such stamps, and particularly for prescribing the application thereof to documents from time to time in use or required to be used for the purposes of such stamps, and for insuring the proper cancellation of stamps, and for keeping accounts of such stamps.

(4.) Any document which ought to bear a stamp in pursuance of this Act, or any rule or order made thereunder, shall not be received, filed, used, or admitted in evidence, unless and until it is properly stamped, within the time prescribed by the rules under this section regulating the use of stamps, but if any such document is, through mistake or inadvertence, received, filed, or used without being properly stamped, the Lord Chancellor or the Court may, if he or it shall think fit, order that the same be stamped as in such order may be directed.

(5.) The Commissioner of Inland Revenue shall keep such separate accounts of all money received in respect of stamps under this Act as the Treasury may from time to time direct, and, subject to the deduction of any expenses incurred by those Commissioners in the execution of this section, the money so received shall, under the direction of the Treasury, be carried to and form part of the Consolidated Fund.

(6.) Any person who forges or counterfeits any such stamp, or uses any such stamp, knowing the same to be forged or counterfeit, or to have been previously cancelled or used, shall be guilty of forgery,

Act 1875, s. 26.

and be liable on conviction to penal servitude for a term not exceeding seven years, or to imprisonment with or without hard labour for a term not exceeding two years.

An order under this section may abolish any existing fees and percentages which may be taken in the said Courts or offices, or any of them, or by the said officers or any of them, but, subject to the provisions of any order made in pursuance of this section, the existing fees and percentages shall continue to be taken, applied, and accounted for in the existing manner.

See the Orders as to fees issued under this section, *post*, pp. 635, *et seq.*

The rules in this section which regulate the collection of fees seem now to be superseded by the provisions of the Public Offices Fees Act, 1879 (42 & 43 Vict. c. 50). By that Act—

Mode of collecting fees payable in public offices

s. 2. The fees payable in any public office shall be collected either in money or by means of stamps, or partly in one way and partly in the other way, according as may be from time to time directed by order of the Commissioners of Her Majesty's Treasury (in this Act referred to as the Treasury).

Every such order shall be published in the *London Gazette*, and shall come into operation on the date of such publication or any later date mentioned in the order.

Regulations by Treasury.

s. 3. The Treasury may from time to time make, and when made revoke, alter, and add to, regulations for all or any of the following purposes respecting fees in any public office; that is to say,

(1.) Regulating the manner in which the fees, taken in money, are to be taken, accounted for, and paid over:

(2.) Determining the use of impressed or adhesive stamps, and the mode of cancellation of adhesive stamps:

(3.) Regulating the use of stamps and prescribing the application thereof to documents from time to time in use, and requiring documents to be used for the purpose of such stamps.

The regulations for the time being in force under this section shall apply to the office named in such regulations, and shall be binding on all courts, officers, and persons to whom those regulations refer, in the same manner as if they were enacted by this Act.

Any document which ought to bear a stamp in pursuance of any regulations in force under this section shall not be received, filed, used, or admitted in evidence unless or until it is properly stamped within the time prescribed by the regulations, but if any such document is, through mistake or inadvertence, received, filed, or used without being properly stamped, the same may be stamped under the direction of such court or person, and under such conditions as may be prescribed by the regulations.

Any regulations under this Act, so far as they relate to the

office of any court of law, shall be made with the consent of the Lord Chancellor.

Saving for powers respecting alteration of fees.

s. 4. Nothing in this Act shall interfere with any power of altering or otherwise regulating the amount of any fees for the time being payable in any public office, or of any salary or charge for the time being payable out of such fees.

Preparation and issue of stamps.

s. 5. The Commissioners of Inland Revenue shall prepare and issue stamps required for the purposes of this Act, and all enactments relating to the forgery and counterfeiting of stamps under the control of the Commissioners of Inland Revenue, and of dies or paper for the same, and to the fraudulent use thereof, shall apply in the case of stamps under this Act.

The Commissioners of Inland Revenue shall keep such separate accounts of all moneys received in respect of stamps under this Act as the Treasury from time to time direct.

Application of fees.

s. 6. Subject to the deduction of any expenses incurred by the Commissioners of Inland Revenue in respect of the preparation and issue of stamps, all moneys received by those Commissioners in respect of stamps under this Act shall be applied as fees collected under this Act.

All fees collected under this Act, when applicable by law to the payment of salaries or other expenses or otherwise, shall be so applied, but, save as aforesaid, shall be paid into the Exchequer, and form part of the Consolidated Fund.

Application of Act.

s. 7. This Act shall apply to all fees, percentages, and other sums payable in or to any officer of any public office or department the expenses of which are paid wholly or partly out of the Consolidated Fund or moneys provided by Parliament, including the offices connected with the Supreme Courts of Judicature, courts of bankruptcy, county courts, and other courts of law in the United Kingdom, or payable to any officer who is paid wholly or partly out of the Consolidated Fund or moneys provided by Parliament; and the expression "fee" shall include all such percentages and sums.

Provided that nothing in this Act shall apply—

(1.) to duties granted to Her Majesty and under the control of the Commissioners of Customs or the Commissioners of Inland Revenue; or

(2.) to any fees payable in either House of Parliament; or

(3.) to any fees payable in, or to any officer of, any office of Her Majesty's Duchy or County Palatine of Lancaster, unless the Chancellor of the said Duchy or County Palatine of Lancaster consents to the Act applying to such last-mentioned fees.

Repeal of 29 & 30 Vict. c. 76, and other enactments.

s. 8. The Public Offices Fees Act, 1866, and every other enactment relating to the taking, applying, and accounting for any fees to which this Act applies, are hereby repealed:

Provided that—

(1.) This repeal shall not affect anything already done or suffered in pursuance of any enactment hereby repealed; and

(2.) The fees to which this Act applies shall, until any order is made under this Act with respect to those fees, continue to be taken, applied, and accounted for in the existing

Act 1875, ss. 26, 27.

manner in all respects as if the enactments hereby repealed which relate thereto were not repealed.

The Order as to taking Fees by Stamp, of 12 July, 1881, *post*, p. 665, recites s. 26 of the Act of 1875, but does not refer to or purport to be made under the new Act.

Sect. 27. Provisions as to Lancaster Fee Fund, and salaries, &c., of officers of Courts at Lancaster and Durham, 32 & 33 Vict. c. 37.

27. Whereas by the Common Pleas at Lancaster Amendment Act, 1869, the fees taken by the prothonotaries and district prothonotaries in pursuance of that Act, are directed to be carried to the credit of "the Prothonotaries Fee Fund Account of the County Palatine of Lancaster," and certain salaries and expenses connected with the offices of the said prothonotaries and district prothonotaries are directed to be paid out of that account:

And whereas, on the 24th day of June, one thousand eight hundred and seventy-four, there was standing to the credit of that account a sum of ten thousand seven hundred and fifty-five pounds Consolidated three pounds per Centum Bank Annuities, and one thousand eight hundred and ten pounds cash, or thereabouts:

And whereas the fees received in the Court of Pleas of Durham are applied in payment of disbursements connected with the office of the prothonotary of that Court, and any surplus of such fees is paid into the receipt of Her Majesty's Exchequer, and any deficiency of the amount of the said fees to pay such disbursements is charged on the Consolidated Fund of the United Kingdom:

And whereas after the commencement of the principal Act, the jurisdiction of the Court of Common Pleas at Lancaster and the Court of Pleas at Durham is by that Act transferred to and vested in the High Court of Justice, and it is expedient to make further provision respecting the expenses of those Courts and the said stock and cash standing to the credit of the prothonotaries fee fund account of the county palatine of Lancaster:

Be it therefore enacted that,—

After the commencement of the principal Act there shall be paid out of moneys provided by Parliament such sums by way of salary or remuneration to the prothonotaries and district prothonotaries of the Court of Common Pleas at Lancaster and the Court of Common[1] Pleas at Durham and their clerks, and such sums for rent, taxes and other outgoings at their offices, as the Lord Chancellor, with the concurrence of the Treasury, may from time to time direct.

[1] *Sic.*

As soon as each prothonotary and district prothonotary

of the Court of Common Pleas at Lancaster has accounted for and paid all fees and moneys which he shall have received by virtue of his said office, the Chancellor of the Duchy of Lancaster shall cause any security given by such officer in pursuance of section seventeen of the Common Pleas at Lancaster Amendment Act, 1869, to be cancelled, and delivered up, or otherwise discharged. Act 1875, ss. 27, 28. 32 & 33 Vict. c. 37.

As soon as may be after the commencement of the principal Act the Treasury and the Chancellor of the Duchy and County Palatine of Lancaster shall ascertain the amount of stock and cash standing to the credit of the prothonotaries' fee fund account of the County Palatine of Lancaster, after paying thereout to the Receiver-General of the revenues of the duchy of Lancaster the amount of the fees remaining in the prothonotary's hands on the twenty-fourth day of October, one thousand eight hundred and sixty-nine, and paid to that account in pursuance of section seventeen of the last-mentioned Act, and all other sums justly due to Her Majesty in right of Her said Duchy and County Palatine; and the Treasury shall by warrant direct the Governor and Company of the Bank of England to transfer to the Commissioners for the Reduction of the National Debt the amount of stock and cash so ascertained, and either to cancel the stock in their books or otherwise dispose of the same as may be directed by the warrant; and the Governor and Company of the Bank of England shall transfer the stock and cash, and cancel or otherwise dispose of the stock according to the warrant, without any order from the Lord Chancellor or the Chancellor of the said Duchy and County Palatine or any other person.

The Commissioners for the Reduction of the National Debt shall apply all cash transferred to them in pursuance of this section in the purchase of Bank Annuities which shall be cancelled or otherwise disposed of in like manner as the said stock.

Sect. 28. Annual account of fees and expenditure.

28. The Treasury shall cause to be prepared annually an account for the year ending the thirty-first day of March, showing the receipts and expenditure during the preceding year in respect of the High Court of Justice and the Court of Appeal, and of any Court, office, or officer, the fees taken in which or by whom can be fixed in pursuance of this Act.

Such account shall be made out in such form and contain such particulars as the Treasury, with the concurrence of the Lord Chancellor, may from time to time direct.

Act 1875, ss. 28, 29.

Every officer by whom or in whose office fees are taken which can be fixed in pursuance of this Act, shall make such returns and give such information as the Treasury may from time to time require for the purpose of enabling them to make out the said account.

The said account shall be laid before both Houses of Parliament within one month after the thirty-first day of March in each year, if Parliament is then sitting, or, if not, then within one month after the next meeting of Parliament.

See s. 26, *ante*, and note thereto. This section seems to be partially superseded by the more general powers of s. 3 of the Public Offices Fees Act, 1879, there set out.

Sect. 29. Amendment of law as to payments to senior puisne judge of Queen's Bench, and Queen's coroner.

29. Whereas fines and other moneys paid into the Court of Queen's Bench for Her Majesty's use are received by the Queen's coroner and attorney, and out of such moneys there is paid in pursuance of a writ of privy seal an annual sum of forty pounds, at the rate of ten pounds for every term, to the second Judge of the Court of Queen's Bench, and by section seven of the Act of the sixth year of King George the Fourth, chapter eighty-four, it is enacted that the said termly allowance of ten pounds shall continue to be paid to the said second Judge in addition to his salary.

And whereas out of the said moneys there is also payable in pursuance of the said writ of privy seal an annual sum of ten pounds to the Queen's coroner and attorney:

And whereas it is expedient to determine such payments:

Be it therefore enacted as follows:

After the passing of this Act the said sums of forty pounds and ten pounds a year shall cease to be payable by the Queen's coroner and attorney out of the above-mentioned moneys.

So long as the person who on the first day of March, one thousand eight hundred and seventy-five, was the second Judge of the Court of Queen's Bench continues to be such second Judge, there shall be payable to him out of the Consolidated Fund of the United Kingdom the annual sum of forty pounds in addition to his salary, and that annual sum shall be payable to him by instalments of ten pounds at the like times at which the said termly allowance of ten pounds has heretofore been payable to him, or at such other times as the Treasury, with the consent of the Judge, may direct.

So long as the person who, on the first day of March,

one thousand eight hundred and seventy-five, was the Queen's coroner and attorney continues to hold that office, there shall be payable to him out of moneys provided by Parliament the annual sum of ten pounds, and such sum shall be payable to him at the like time at which the said annual sum of ten pounds has heretofore been payable to him, or at such other time as the Treasury, with the consent of such Queen's coroner or attorney, may direct.

Act 1875, ss. 29, 30.

30. Whereas by section sixteen of "The Court of Chancery Funds Act, 1872," it is enacted that an order of the Court of Chancery may direct securities standing to the account of the Paymaster General on behalf of the Court of Chancery to be converted into cash, and that where such order refers to Government securities such securities shall be transferred to the Commissioners for the reduction of the National Debt in manner therein mentioned:

Sect. 30. Amendment of 35 & 36 Vict. c. 44, as to the transfer of Government securities to and from the Paymaster General on behalf of the Court of Chancery and the National Debt Commissioners.

And whereas the said section contains no provision for the converse cases of the conversion of cash into securities and the transfer of securities from the said Commissioners to the account of the Paymaster General on behalf of the Court of Chancery:

And whereas such conversion and transfer, and the other matters provided by the said section, can be more conveniently provided for by rules made in pursuance of section eighteen of the said Act; and it is expedient to remove doubts with respect to the power to provide by such rules for the investment in securities of money in Court, and the conversion into money of securities in Court:

Be it therefore enacted as follows:

Section sixteen of "The Court of Chancery Funds Act, 1872," is hereby repealed.

Rules may from time to time be made in pursuance of section eighteen of "The Court of Chancery Funds Act, 1872," with respect to the investment in securities of money in Court, and the conversion into money of securities in Court, and with respect to the transfer to the Commissioners for the reduction of the National Debt of Government securities ordered by the Court to be sold or converted into cash, and to the transfer by those Commissioners to the Paymaster General for the time being, on behalf of the Court of Chancery, of Government securities ordered by the Court of Chancery to be purchased.

This section shall come into operation on the passing of this Act, and shall be construed together with "The Court

Act 1875, ss. 30—32.

of Chancery Funds Act, 1872," and shall be subject to any alteration in that Act made by or in pursuance of the principal Act or this Act.

Sect. 31. Abolition of secretary to the visitors of lunatics, 6 & 17 Vict. c. 70.

31. Whereas under the Lunacy Regulation Act, 1853, it is provided that there shall be a secretary to the visitors of lunatics therein mentioned, and it is expedient to abolish that office: Be it therefore enacted as follows:

After the passing of this Act there shall cease to be a secretary to the visitors of lunatics.

The Treasury shall award, out of moneys provided by Parliament, to the person who holds at the passing of this Act the office of secretary to the visitors of lunatics such compensation, by way of annuity or otherwise, as, having regard to the conditions on which he was appointed to his office, the nature, salary, and emoluments of his office, and the duration of his services, they may think just and reasonable, so that the same be granted in accordance with the provisions and subject to the conditions contained in the Superannuation Act, 1859.

22 Vict. c. 26.

Sect. 32. Amendment of 32 & 33 Vict. c. 83, s. 19; and 32 & 33 Vict. c. 71, s. 116, as to payment of unclaimed dividends to persons entitled.

32. Whereas by section nineteen of "The Bankruptcy Repeal and Insolvent Court Act, 1869," it is enacted as follows: "All dividends declared in any Court acting under the Acts relating to bankruptcy or the relief of insolvent debtors which remain unclaimed for five years after the commencement of this Act, if declared before that commencement, and for five years after the declaration of the dividends if declared after the commencement of this Act, and all undivided surpluses of estates administered under the jurisdiction of such Court which remain undivided for five years after the declaration of a final dividend in the case of bankruptcy, or five years after the close of an insolvency under this Act, shall be deemed vested in the Crown, and shall be disposed of as the Commissioners of Her Majesty's Treasury direct; provided that at any time after such vesting the Lord Chancellor may, if he thinks fit, by reason of the disability or absence beyond seas of the person entitled to the sum so vested, or for any other reason appearing to him sufficient, direct that the sum so vested shall be repaid out of moneys provided by Parliament, and shall be distributed as it would have been if there had been no such vesting:"

And whereas a similar enactment with respect to unclaimed dividends in bankruptcy was made by section one hundred and sixteen of "The Bankruptcy Act, 1869:"

32 & 33 Vict.

And whereas it is expedient to give to persons entitled

to any such unclaimed dividends or other sums greater facilities for obtaining the same: Be it therefore enacted as follows: Act 1875, ss. 32—34.

Any Court having jurisdiction in the matter of any bankruptcy or insolvency, upon being satisfied that any person claiming is entitled to any dividend or other payment out of the moneys vested in the Crown in pursuance of section nineteen of "The Bankruptcy Repeal and Insolvent Court Act, 1869," or of section one hundred and sixteen of "The Bankruptcy Act, 1869," may order payment of the same in like manner as it might have done if the same had not by reason of the expiration of five years become vested in the Crown in pursuance of the said sections. 32 & 33 Vict cc. 83, 71.

This section shall take effect as from the passing of this Act.

33. From and after the commencement of this Act there shall be repealed— Sect. 33. Repeal.

(1.) The Acts specified in the Second Schedule to this Act, to the extent in the third column of that schedule mentioned, without prejudice to anything done or suffered before the said commencement under the enactments hereby repealed; also,

(2.) Any other enactment inconsistent with this Act or the principal Act.

For the second schedule, see *post*, p. 126.

As to the canon of construction for determining that enactments are or are not inconsistent, see *Garnett* v. *Bradley*, 3 App. Cas. 944, H. L. esp. at pp. 956 and 965.

As to explaining the meaning of an enactment by reference to an enactment which it repeals, see *Att.-Gen.* v. *Lamplough*, 3 Ex. D., at 227, 231, 234, C. A.

34. Whereas, by the seventy-seventh section of the principal Act, it is provided that, upon the occurrence of a vacancy in the office of any officer coming within the provisions of the said section, the Lord Chancellor, with the concurrence of the Treasury, may, in the event of such office being considered unnecessary, abolish the same, or may reduce the salary, or alter the designation or duties thereof, notwithstanding that the patronage thereof may be vested in an existing judge; but that nothing in the said Act contained shall interfere with the office of marshal attending any commissioner of assize: And whereas it is expedient to add to the said section: Be it enacted, that, upon the occurrence of any vacancy coming within the Sect. 34. As to vacancies in any office within s. 77 of principal Act.

Act 1875, ss. 34, 35.

provisions of the said section, an appointment shall not be made thereto for the period of one month without the assent of the Lord Chancellor, given with the concurrence of the Treasury; and, further, the Lord Chancellor may, with the concurrence of the Treasury, suspend the making any appointment to such office for any period not later than the first day of January, one thousand eight hundred and seventy-seven, and may, if it be necessary, make provision in such manner as he thinks fit for the temporary discharge, in the meantime, of the duties of such office.

See s. 77 of the Act of 1873, *ante*, p. 75, and note thereto. This section is superseded by s. 9 of the Act of 1879, *post*, p. 147.

Sect. 35. Amendment of principal Act, s. 79, as to chamber clerks.

35. Be it enacted, that any person who, at the time of the commencement of this Act, shall hold the office of chamber clerk shall be eligible at any time thereafter for appointment to the like office, anything in the principal Act to the contrary notwithstanding; and that, if any such person shall be so appointed after the commencement of this Act, he shall, if the salary assigned to such office, by or under the principal Act be less than the salary received by him at the time of the commencement of this Act, be entitled to receive a salary not less than that so formerly received by him so long as he shall retain such office, but shall not be entitled to receive or claim any pension in respect of his service, unless the Treasury, in its absolute discretion, shall think fit to sanction the same.

See s. 79 of the Act of 1873, *ante*, p. 79, and note thereto. See also O. LXA., *post*, p. 433.

N.B.—The Rules of Court, post, p. 175, *constitute the First Schedule to this Act.*

SECOND SCHEDULE TO THE ACT OF 1875.

2nd Schedule.

Session and Chapter.	Title.	Extent of Repeal.
6 Geo. 4, c. 84.	An Act to provide for the augmenting the salaries of the Master of the Rolls and the Vice-Chancellor of England, the Chief Baron of the Court of Exchequer, and the Puisne Judges and Barons of the Courts	Section seven.

Session and Chapter.	Title.	Extent of Repeal.
	in Westminster Hall, and to enable His Majesty to grant an annuity to such Vice-Chancellor, and additional annuities to such Master of the Rolls, Chief Baron, and Puisne Judges and Barons on their resignation of their respective offices.	
32 & 33 Vict. c. 71	The Bankruptcy Act, 1869.	Section one hundred and sixteen, from "provided that at any time," inclusive, to end of the section.
32 & 33 Vict. c. 83	The Bankruptcy Repeal and Insolvent Court Act, 1869.	Section nineteen from "provided that at any time," inclusive, to end of the section.
36 & 37 Vict. c. 66	Supreme Court of Judicature Act, 1873.	So much of sections three and sixteen as relates to the London Court of Bankruptcy, section six, section nine, section ten, so much of section thirteen as relates to additional judges of the Court of Appeal, section thirty-four from "all matters pending "in the London "Court of Bank-"ruptcy," to "Lon-"don Court of Bank-"ruptcy," section thirty-five, section forty-eight, section fifty-three, section sixty-three, section sixty-eight, section sixty-nine, section seventy, section seventy-one, section seventy-two, section seventy-three, section seventy-four, and the whole of the schedule.

See Act of 1875, s. 33, *ante*, p. 125. Section 54 of the Act of 1873 is also repealed by s. 4 of Act of 1875; see *ante*, p. 97.

APPELLATE JURISDICTION ACT, 1876.

39 & 40 VICT. c. 59.

Act 1876, ss. 1—3.

An Act for amending the Law in respect of the Appellate Jurisdiction of the House of Lords; and for other purposes.

[11th August, 1876.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PRELIMINARY.

Sect. 1. Short title.

1. This Act may be cited for all purposes as "The Appellate Jurisdiction Act, 1876."

Sect. 2. Commencement of Act.

2. This Act shall, except where it is otherwise expressly provided, come into operation on the first day of November one thousand eight hundred and seventy-six, which day is hereinafter referred to as the commencement of this Act.

APPEAL.

Sect. 3. Cases in which appeal lies to House of Lords.

3. Subject as in this Act mentioned, an appeal shall lie to the House of Lords from any order or judgment of any of the Courts following; that is to say,

(1.) Of Her Majesty's Court of Appeal in England; and

(2.) Of any Court in Scotland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords by common law or by statute; and

(3.) Of any Court in Ireland from which error or an

appeal at or immediately before the commencement of this Act lay to the House of Lords by common law or by statute. Act 1876, ss. 3—6.

The Act of 1873, s. 20, *ante*, p. 16, contemplated the abolition of all appeals to the House of Lords. The operation of that section was suspended by s. 2 of the Act of 1875, *ante*, p. 95. And the present Act permanently established the appellate jurisdiction of the House of Lords. As to requiring the fiat of the Attorney-General, see s. 10, *post*, p. 132.

The general right of appeal given by this section, from any order or judgment of the Court of Appeal is limited as regards Divorce and Legitimacy appeals by ss. 9 and 10 of the Act of 1881, see *post*, p. 165.

As to leave to appeal in Bankruptcy cases, see *Ex p. Jackson*, 14 Ch. D. 725, C. A.

See s. 12 of this Act, *post*, p. 132, as to Scotch and Irish appeals.

No appeal lies to the House of Lords on a question of costs alone, but where the Court of Appeal granted a new trial on the terms that the defendant should first pay the plaintiff's costs of the first trial, it was held that an appeal from this order would be entertained: *Metropolitan Asylums District* v. *Hill*, 5 App. Cas. 582 (H. L.).

Sect. 4. Form of appeal to House of Lords.

4. Every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before Her Majesty the Queen in Her Court of Parliament, in order that the said Court may determine what of right, and according to the law and custom of this realm, ought to be done in the subject-matter of such appeal.

As to the procedure on appeal, see Forms and Orders, *post*, p. 673, *et seq.*

Sect. 5. Attendance of certain number of Lords of Appeal required at hearing and determination of appeals.

5. An appeal shall not be heard and determined by the House of Lords unless there are present at such hearing and determination not less than three of the following persons, in this Act designated Lords of Appeal; that is to say,

(1.) The Lord Chancellor of Great Britain for the time being; and

(2.) The Lords of Appeal in Ordinary to be appointed as in this Act mentioned; and

(3.) Such Peers of Parliament as are for the time being holding or have held any of the offices in this Act described as high judicial offices.

Sect. 6. Appointment of Lords of

6. For the purpose of aiding the House of Lords in the hearing and determination of appeals, Her Majesty may, at any time after the passing of this Act, by letters

Act 1876, ss. 6, 7.

patent, appoint two qualified persons to be Lords of Appeal in Ordinary, but such appointment shall not take effect until the commencement of this Act.

Appeal in Ordinary by Her Majesty

A person shall not be qualified to be appointed by Her Majesty a Lord of Appeal in Ordinary unless he has been at or before the time of his appointment the holder for a period of not less than two years of some one or more of the offices in this Act described as high judicial offices, or has been at or before such time as aforesaid, for not less than fifteen years, a practising barrister in England or Ireland, or a practising advocate in Scotland.

Every Lord of Appeal in Ordinary shall hold his office during good behaviour, and shall continue to hold the same notwithstanding the demise of the Crown, but he may be removed from such office on the address of both Houses of Parliament.

There shall be paid to every Lord of Appeal in Ordinary a salary of six thousand pounds a year.

Every Lord of Appeal in Ordinary, unless he is otherwise entitled to sit as a member of the House of Lords, shall by virtue and according to the date of his appointment be entitled during his life to rank as a baron by such style as Her Majesty may be pleased to appoint, and shall during the time that he continues in his office as a Lord of Appeal in Ordinary, and no longer, be entitled to a writ of summons to attend, and to sit and vote in the House of Lords; his dignity as a Lord of Parliament shall not descend to his heirs.

On any Lord of Appeal in Ordinary vacating his office, by death, resignation, or otherwise, Her Majesty may fill up the vacancy by the appointment of another qualified person.

A Lord of Appeal in Ordinary shall, if a Privy Councillor, be a member of the Judicial Committee of the Privy Council, and, subject to the due performance by a Lord of Appeal in Ordinary of his duties as to the hearing and determining of appeals in the House of Lords, it shall be his duty, being a Privy Councillor, to sit and act as a member of the Judicial Committee of the Privy Council.

As to the meaning of the term "High Judicial Office" in this section, see s. 25, *post*, p. 141. As to increasing the number of Lords of Appeal, see s. 14, *post*, p. 132.

Supplemental Provisions.

Sect. 7.

Pension of Lord of

7. Her Majesty may by letters patent grant to any Lord of Appeal in Ordinary, who has served for fifteen years or is disabled by permanent infirmity from the perform-

ance of the duties of his office, a pension by way of annuity to be continued during his life equal in amount to the pension which might under similar circumstances be granted to the Master of the Rolls, in pursuance of the Supreme Court of Judicature Act, 1873. Act 1876, ss. 7—9. Appeal in Ordinary.

Previous service in any office described in this Act as a high judicial office shall for the purposes of pension be deemed equivalent to service in the office of a Lord of Appeal in Ordinary under this Act.

The salary and pension payable to a Lord of Appeal in Ordinary shall be charged on and paid out of the consolidated fund of the United Kingdom, and shall accrue due from day to day, and shall be payable to the person entitled thereto, or to his executors and administrators, at such intervals in every year, not being longer than three months, as the Treasury may from time to time determine.

Sect. 8. Hearing and determination of appeals during prorogation of Parliament.

8. For preventing delay in the administration of justice, the House of Lords may sit and act for the purpose of hearing and determining appeals, and also for the purpose of Lords of Appeal in Ordinary taking their seats and the oaths, during any prorogation of Parliament, at such time and in such manner as may be appointed by order of the House of Lords made during the preceding session of Parliament; and all orders and proceedings of the said House in relation to appeals and matters connected therewith during such prorogation, shall be as valid as if Parliament had been then sitting, but no business other than the hearing and determination of appeals and the matters connected therewith, and Lords of Appeal in Ordinary taking their seats and the oaths as aforesaid, shall be transacted by such House during such prorogation.

Any order of the House of Lords may for the purposes of this Act be made at any time after the passing of this Act.

Sect. 9. Hearing and determination of appeals during dissolution of Parliament.

9. If on the occasion of a dissolution of Parliament Her Majesty is graciously pleased to think that it would be expedient, with a view to prevent delay in the administration of justice, to provide for the hearing and determination of appeals during such dissolution, it shall be lawful for Her Majesty, by writing under her sign manual, to authorise the Lords of Appeal in the name of the House of Lords to hear and determine appeals during the dissolution of Parliament, and for that purpose to sit in the House of Lords at such times as may be thought

Act 1876, ss. 9—14.

expedient; and upon such authority as aforesaid being given by Her Majesty, the Lords of Appeal may, during such dissolution, hear and determine appeals and act in all matters in relation thereto in the same manner in all respects as if their sittings were a continuation of the sittings of the House of Lords, and may, in the name of the House of Lords, exercise the jurisdiction of the House of Lords accordingly.

Sect. 10. Saving as to fiat of Attorney-General.

10. An appeal shall not be entertained by the House of Lords without the consent of the Attorney-General or other law officer of the Crown in any case where proceedings in error or on appeal could not hitherto have been had in the House of Lords without the fiat or consent of such officer.

Sect. 11. Procedure under Act to supersede all other procedure.

11. After the commencement of this Act, error shall not lie to the House of Lords, and an appeal shall not lie from any of the Courts from which an appeal to the House of Lords is given by this Act, except in manner provided by this Act, and subject to such conditions as to the value of the subject-matter in dispute, and as to giving security for costs, and as to the time within which the appeal shall be brought, and generally as to all matters of practice and procedure, or otherwise, as may be imposed by orders of the House of Lords.

Every appeal must, by s. 4, *ante*, p. 129, be by petition. See Forms and Orders, *post*, p. 673, *et seq.*

Sect. 12. Certain cases excluded from appeal.

12. Except in so far as may be authorised by orders of the House of Lords, an appeal shall not lie to the House of Lords from any Court in Scotland or Ireland in any case which, according to the law or practice hitherto in use, could not have been reviewed by that House, either in error or on appeal.

Sect. 13. Provision as to pending business.

13. Nothing in this Act contained shall affect the jurisdiction of the House of Lords in respect of any error or appeal pending therein at the time of the commencement of this Act, and any such error or appeal may be heard and determined, and all proceedings in relation thereto may be conducted in the same manner in all respects as if this Act had not passed.

AMENDMENT OF ACTS.

Sect. 14. Amendment of the Act of

14. Whereas, by the Act of the session of the thirty-fourth and thirty-fifth years of the reign of Her present

Majesty, chapter ninety-one, intituled "An Act to make further provision for the despatch of business by the Judicial Committee of the Privy Council," Her Majesty was empowered to appoint and did appoint four persons qualified as in that Act mentioned to act as members of the Judicial Committee of the Privy Council at such salaries as are in the said Act mentioned, in this Act referred to as paid Judges of the Judicial Committee of the Privy Council:

Act 1876, s. 14.

34 & 35 Vict. c. 91, relating to the constitution of the Privy Council.

And whereas the power given by the said Act of filling any vacancies occasioned by death, or otherwise, in the offices of the persons so appointed, has lapsed by efflux of time, and Her Majesty has no power to fill any such vacancies:

Be it enacted, that whenever any two of the paid judges of the Judicial Committee of the Privy Council have died or resigned, Her Majesty may appoint a third Lord of Appeal in Ordinary in addition to the Lords of Appeal in Ordinary hereinbefore authorised to be appointed, and on the death or resignation of the remaining two paid judges of the Judicial Committee of the Privy Council Her Majesty may appoint a fourth Lord of Appeal in Ordinary in addition to the Lords of Appeal in Ordinary aforesaid: and may from time to time fill up any vacancies occurring in the offices of such third and fourth Lord of Appeal in Ordinary.

Any Lord of Appeal in Ordinary appointed in pursuance of this section shall be appointed in the same manner, hold his office by the same tenure, be entitled to the same salary and pension, and in all respects be in the same position as if he were a Lord of Appeal in Ordinary appointed in pursuance of the power in this Act before given to Her Majesty.

Her Majesty may, by Order in Council, with the advice of the Judicial Committee of Her Majesty's Privy Council, or any five of them, of whom the Lord Chancellor shall be one, and of the archbishops and bishops being members of Her Majesty's Privy Council, or any two of them, make rules for the attendance, on the hearing of Ecclesiastical cases, as assessors of the said committee, of such number of the archbishops and bishops of the Church of England as may be determined by such rules.

The rules may provide for the assessors being appointed for one or more year or years, or by rotation or otherwise, and for filling up any temporary or other vacancies in the office of assessor.

Any rule made in pursuance of this section shall be

Act 1876, ss. 14, 15.

laid before each House of Parliament within forty days after it is made if Parliament be then sitting, or, if not then sitting, within forty days after the commencement of the then next session of Parliament.

If either House of Parliament present an address to Her Majesty within forty days after any such rule has been laid before such House, praying that any such rule may be annulled, Her Majesty may thereupon, by Order in Council, annul the same, and the rule so annulled shall thenceforth become void, but without prejudice nevertheless to the making of any other rule in its place, or to the validity of anything which may in the meantime have been done under any such rule.

Sect. 15. Amendment of the Supreme Court of Judicature Acts in relation to Her Majesty's Court of Appeal.

15. Whereas it is expedient to amend the constitution of Her Majesty's Court of Appeal in manner hereinafter mentioned: Be it enacted, that there shall be repealed so much of the fourth section of the Supreme Court of Judicature Act, 1875, as provides that the ordinary Judges of Her Majesty's Court of Appeal (in this Act referred to as "the Court of Appeal") shall not exceed three at any one time.

In addition to the number of ordinary judges of the Court of Appeal authorised to be appointed by the Supreme Court of Judicature Act, 1875, Her Majesty may appoint three additional ordinary judges of that court.

The first three appointments of additional judges under this Act shall be made by such transfer to the Court of Appeal as is in this section mentioned of three judges of the High Court of Justice, and the vacancies so created in the High Court of Justice shall not be filled up, except in the event and to the extent hereinafter mentioned.

Her Majesty may, by writing, under her sign manual, either before or after the commencement of this Act, but so as not to take effect until the commencement thereof, transfer to the Court of Appeal from the following divisions of the High Court of Justice, that is to say, the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division, such of the judges of the said Divisions, not exceeding three in number, as to Her Majesty may seem meet, each of whom shall have been a judge of any one or more of such Divisions for not less than two years previously to his appointment, and shall not be an *ex officio* judge of the Court of Appeal, and

every judge so transferred shall be deemed an additional ordinary judge of the Court of Appeal in the same manner as if he had been appointed such judge by letters patent. No judge shall be so transferred without his own consent. Act 1876, s. 15.

Every additional ordinary judge of the said Court of Appeal appointed in pursuance of this Act shall be subject to the provisions of sections twenty-nine and thirty-seven of the Supreme Court of Judicature Act, 1873, and shall be under an obligation to go circuits and to act as commissioner under commissions of assize or other commissions authorised to be issued in pursuance of the said Act, in the same manner in all respects as if he were a judge of the High Court of Justice.

There shall be paid to every additional ordinary judge appointed in pursuance of this Act, in addition to the salary which he would otherwise receive as an ordinary judge of the Court of Appeal, such sum on account of his expenses on circuit or under such commission as aforesaid as may be approved by the Treasury upon the recommendation of the Lord Chancellor.

Each of the judges of the High Court of Justice who is, in pursuance of this Act, transferred to the Court of Appeal, by writing under the sign manual of her Majesty, shall retain such officers as are attached to his person as such judge, and are appointed and removable by him at his pleasure, in pursuance of the Supreme Court of Judicature Act, 1873, and the officers so attached shall have the same rank, and hold their offices by the same tenure, and upon the same terms and conditions, and receive the same salaries, and if entitled to pensions, be entitled to the same pensions, and shall, as nearly as may be, perform the same duties as if the judges to whom they are attached had not been transferred to the Court of Appeal.

Subject as aforesaid, the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, for the time being in force in relation to the appointment of ordinary judges of Her Majesty's Court of Appeal, and to their tenure of office, and to their precedence, and to their salaries and pensions, and to the officers to be attached to such judges, and all other provisions relating to such ordinary judges, shall apply to the additional ordinary judges appointed in pursuance of this section in the same manner as they apply to the other ordinary judges of the said Court.

For the purpose of a transfer to the Court of Appeal

Act 1876, ss. 15—17.

under this section, service as a judge in a Court whose jurisdiction is transferred to the High Court shall be deemed to have been service as a judge in any one or more of such divisions of the High Court as are in this section in that behalf mentioned; and for the purpose of the pension of any person appointed under this Act an additional ordinary Judge of Appeal, service in the High Court of Justice, or in any Court whose jurisdiction is transferred to the High Court of Justice or to the Court of Appeal, shall be deemed to have been service in the Court of Appeal.

See ss. 2, 3, 4 of the Act of 1881, *post*, p. 162, making the Master of the Rolls a judge of appeal only, and making the President of the Probate and Divorce Division an *ex officio* member of the Court of Appeal.

Sect. 16. Orders in relation to conduct of business in Her Majesty's Court of Appeal.

16. Orders for constituting and holding Divisional Courts of the Court of Appeal, and for regulating the sittings of the Court of Appeal, and of the Divisional Courts of Appeal, may be made, and when made in like manner rescinded or altered, by the President of the Court of Appeal, with the concurrence of the ordinary judges of the Court of Appeal, or any three of them; and so much of section seventeen of the Supreme Court of Judicature Act, 1875, as relates to the regulation of any matters subject to be regulated by orders under this section, and so much of any Rules of Court as may be inconsistent with any order made under this section, shall be repealed, without prejudice nevertheless to any Rules of Court made in pursuance of the section so repealed, so long as such Rules of Court remain unaffected by orders made in pursuance of this section.

See note to s. 17 of the Act of 1875, *ante*, p. 109.

Sect. 17. Regulations as to business of High Court of Justice and Divisional Courts of High Court

17. On and after the first day of December, one thousand eight hundred and seventy-six, every action and proceeding in the High Court of Justice, and all business arising out of the same, except as is hereinafter provided, shall, so far as is practicable and convenient, be heard, determined, and disposed of before a single judge, and all proceedings in an action subsequent to the hearing or trial, and down to and including the final judgment or order, except as aforesaid, and always excepting any proceedings on appeal in the Court of Appeal, shall, so far as is practicable and convenient, be had and taken before the judge before whom the trial or hearing of the cause took place: Provided nevertheless, that Divisional Courts

of the High Court of Justice may be held for the transaction of any business which may for the time being be ordered by Rules of Court to be heard by a Divisional Court; and any such Divisional Court, when held, shall be constituted of two judges of the Court and no more, unless the President of the Division to which such Divisional Court belongs, with the concurrence of the other judges of such Division, or a majority thereof, is of opinion that such Divisional Court should be constituted of a greater number of judges than two, in which case such Court may be constituted of such number of judges as the President, with such concurrence as aforesaid, may think expedient; nevertheless the decisions of a Divisional Court shall not be invalidated by reason of such Court being constituted of a greater number than two judges; and

Act 1876, ss. 17, 18.

Rules of Court for carrying into effect the enactments contained in this section shall be made on or before the first day of December, one thousand eight hundred and seventy-six, and may be afterwards altered, and all Rules of Court to be made after the passing of this Act, whether made under the Supreme Court of Judicature Act, 1875, or this Act, shall be made by any three or more of the following persons, of whom the Lord Chancellor shall be one, namely, the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and four other Judges of the Supreme Court of Judicature, to be from time to time appointed for the purpose by the Lord Chancellor in writing under his hand, such appointment to continue for such time as shall be specified therein, and all such Rules of Court shall be laid before each House of Parliament within such time and subject to be annulled in such manner as is provided by the Supreme Court of Judicature Act, 1875.

There shall be repealed on and after the first day of December, one thousand eight hundred and seventy-six, so much of sections forty, forty-one, forty-two, forty-three, forty-four, and forty-six of the Supreme Court of Judicature Act, 1873, as is inconsistent with the provisions of this section.

The R. S. C., Dec. 1876, were issued to give effect to this section. As to the effect of this section, and those rules, see note to O. XXXVI., r. 22a, *post*, p. 327; O. XXXIX., *post*, p. 349; O. XL., *post*, p. 354; O. LVIIa, *post*, p. 415, and LVIII., r. 19, *post*, p. 431.

18. Whenever any two of the said paid judges of the

Sect. 18

Act 1876, ss. 18–20.

Power in certain events to fill vacancies occasioned in High Court of Justice by removal of Judges to Court of Appeal.

Judicial Committee of the Privy Council have died or resigned, Her Majesty may, upon an address from both Houses of Parliament, representing that the state of business in the High Court of Justice is such as to require the appointment of an additional judge, fill up one of the vacancies created by the transfer hereinbefore authorised, by appointing one new Judge of the said High Court in any Division thereof; and on the death or retirement of the remaining two paid Judges of the said Judicial Committee, Her Majesty may, upon the like address, fill up in like manner another of the said vacancies, and from time to time fill up any vacancies occurring in the offices of judges so appointed.

The Act of 1877, *post*, p. 142, authorised the appointment of another judge to the High Court, who is attached to the Chancery Division.

Sect. 19.

Attendance of Judges of High Court of Justice on Court of Appeal.

19. Where a Judge of the High Court of Justice has been requested to attend as an additional judge at the sittings of the Court of Appeal under section four of the Supreme Court of Judicature Act, 1873, such judge shall, although the period has expired during which his attendance was requested, attend the sittings of the Court of Appeal for the purpose of giving judgment or otherwise in relation to any case which may have been heard by the Court of Appeal during his attendance on the Court of Appeal.

The section intended to be referred to is evidently s. 4 of the Act of 1875, *ante*, p. 96. See also s. 11 of the Act of 1881, *post*, p. 166.

Sect. 20.

Amendment of Judicature Acts as to appeals from High Court of Justice in certain cases.

20. Where by Act of Parliament it is provided that the decision of any Court or judge the jurisdiction of which Court or judge is transferred to the High Court of Justice is to be final, an appeal shall not lie in any such case from the decision of the High Court of Justice, or of any judge thereof, to Her Majesty's Court of Appeal.

This section imposes an important limitation on the general right of appeal from every judgment or order given by the Act of 1873, as to which see s. 19 of that Act, *ante*, p. 13 and note thereto.

The following cases illustrate the operation of the present section. By s. 17 of the Common Law Procedure Act, 1860, it is provided that the judgment in any action or issue in any interpleader proceedings and the decision of the court or a judge in a summary manner shall be final and conclusive. It has been held that no appeal lies from the summary decision of a judge at chambers under s. 14, *Dodds* v. *Shepard*, 1 Ex. D. 75, while an appeal does lie from the order of a judge who, upon motion

directs judgment to be entered after the trial of an interpleader issue; *Witt* v. *Parker*, 46 L. J. Q. B. 450, C.A. **Act 1876, ss. 20—22.**

By s. 14 of the County Courts Act, 1850 (13 & 14 Vict. c 61), an appeal is given in certain cases from the county court to one of the superior courts at Westminster, and it is provided that the orders of the superior court shall be final. By s. 45 of the Act of 1873, *ante*, p. 55, an appeal lies by special leave from the decision of the High Court on a county court appeal. The present section does not revive the provision of the County Court Act which had been impliedly repealed by s. 45 of the Act of 1873, and an appeal still lies by leave from the decision of the High Court on a county court appeal: *Crush* v. *Turner*, 3 Ex. D. 303, C. A.

By s. 42 of the County Courts Act, 1856 (19 & 20 Vict. c. 108), it is provided that when application is made to a superior court for a writ of prohibition to the judge of a county court the matter shall be finally disposed of by rule or order, and no declaration or further proceedings in prohibition shall be allowed. An appeal still lies from the decision of a Divisional Court on an application for a prohibition to a county court: *Barton* v. *Titchmarsh*, 49 L. J. Q. B., C. A.

Sect. 21. Continuation until 1st Jan. 1878 of s. 34, of 38 & 39 Vict. c. 77, as to vacancies in legal offices.

21. Whereas by section thirty-four of the Supreme Court of Judicature Act, 1875, it is enacted that upon the occurrence of any vacancy in an office coming within the provisions of section seventy-seven of the Supreme Court of Judicature Act, 1873, the Lord High Chancellor of Great Britain may, with the concurrence of the Treasury, suspend the making any appointment to such office for any period not later than the first day of January, one thousand eight hundred and seventy-seven, and may, if it be necessary, make provision in such manner as he thinks fit for the temporary discharge in the meantime of the duties of such office, and it is expedient to extend the said period as hereinafter mentioned: Be it therefore enacted as follows:

The said section shall be construed as if the first day of January, one thousand eight hundred and seventy-eight, were therein inserted in lieu of the first day of January, one thousand eight hundred and seventy-seven.

By s. 6 of the Act of 1877, *post*, p. 143, the 1st January, 1879, is substituted.

See s. 77 of the Act of 1873, and note thereto, *ante*, p. 75. See also ss. 21—22 of the Act of 1881, *post*, p. 170.

Sect. 22. Appointment of deputy by district registrar.

22. A district registrar of the Supreme Court of Judicature may from time to time, but in each case with the approval of the Lord Chancellor and subject to such regulations as the Lord Chancellor may from time to time make, appoint a deputy, and all Acts authorised or required to be done by, to, or before a district registrar may

Act 1876, ss. 22—24.

be done by, to, or before any deputy so appointed: Provided always, that in no case such appointment shall be made for a period exceeding three months. This section shall come into force at the time of the passing of this Act.

As to district registrars and their jurisdiction, see ss. 60 to 66 of the Act of 1873, *ante*, pp. 65 to 68; s. 13 of the Act of 1875, *ante*, p. 107; and O. XXXV., *post*, pp. 308, *et seq.*, and s. 22 of the Act of 1881, *post*, p. 170.

Sect. 23. Appointment of vice-admiral, judge, and officers of Vice-Admiralty Court.

23. Whereas by the Vice-Admiralty Courts Act, 1863, it is enacted, that "nothing in this Act contained shall be taken to affect the power of the Admiralty to appoint any vice-admiral, or any judge, registrar, marshal, or other officer of any Vice-Admiralty Court, as heretofore, by warrant from the Admiralty, and by letters patent issued under the seal of the High Court of Admiralty of England:"

And whereas since the commencement of the Supreme Court of Judicature Acts, 1873 and 1875, doubts have arisen with respect to the exercise of the said power of the Admiralty, and it is expedient to remove such doubts: Be it therefore enacted as follows:

Any power of the Admiralty to appoint or cancel the appointment of a vice-admiral, or a judge, registrar, marshal, or other officer of a Vice-Admiralty Court, may, after the passing of this Act, be exercised by some writing under the hands of the Admiralty, and the seal of the office of Admiralty, and in such form as the Admiralty from time to time direct.

Every appointment so made shall have the same effect, and every vice-admiral, judge, registrar, marshal, and other officer so appointed shall have the same jurisdiction, power, and authority, and be subject to the same obligation, as if he had been appointed before the commencement of the Supreme Court of Judicature Acts, 1873 and 1875, under the seal of the High Court of Admiralty of England.

"Admiralty" in this section means the Lord High Admiral, or the commissioners for executing his office, or any two of such commissioners.

Repeal and Definitions.

24. Section sixteen of the Act for better enforcing Church discipline, passed in the session of the third and fourth years of the reign of Her present Majesty, chapter eighty-six, and sections twenty, twenty-one, and fifty-five of the Supreme Court of Judicature Act, 1873, and sec-

24. of sec- the Dis- Act the

tion two of the Supreme Court of Judicature Act, 1875, shall be repealed (with the exception of so much of section two as declares the day on which that Act is to commence). Act 1876, ss. 24, 25. Supreme Court of Judicature Acts.

25. In this Act, if not inconsistent with the context, the following expressions have the meaning hereinafter respectively assigned to them; that is to say, Sect. 25. Definitions.

"High judicial office" means any of the following offices; that is to say, "High judicial office:"

The office of Lord Chancellor of Great Britain or Ireland, or of paid Judge of the Judicial Committee of the Privy Council, or of Judge of one of Her Majesty's Superior Courts of Great Britain and Ireland:

"Superior Courts of Great Britain and Ireland" means and includes, "Superior courts:"

As to England, Her Majesty's High Court of Justice and Her Majesty's Court of Appeal, and the Superior Courts of Law and Equity in England as they existed before the constitution of Her Majesty's High Court of Justice; and

As to Ireland, the Superior Courts of Law and Equity at Dublin; and

As to Scotland, the Court of Session:

"Error" includes a writ of error or any proceedings in or by way of error. "Error."

SUPREME COURT OF JUDICATURE ACT, 1877.

40 VICT. c. 9.

Act 1877, ss. 1—3.

An Act for amending the Supreme Court of Judicature Acts, 1873 and 1875.

[24th April, 1877.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Sect. 1. Construction and short title of Act.

1. This Act shall, so far as is consistent with the tenor thereof, be construed as one with the Supreme Court of Judicature Acts, 1873 and 1875, and together with the said Acts may be cited as the Supreme Court of Judicature Acts, 1873, 1875, 1877, and this Act may be cited separately as "The Supreme Court of Judicature Act, 1877."

Sect. 2. Appointment of additional judge of High Court of Justice.

2. It shall be lawful for Her Majesty to appoint a Judge of the High Court of Justice in addition to the number of judges of that Court authorised to be appointed by the Supreme Court of Judicature Acts, 1873 and 1875.

This section is amended by s. 6 of the Act of 1881, *post*, p. 164, which enables an additional judge to be appointed from time to time in the Chancery Division when the number of judges in that Division is reduced below five.

Sect. 3. Position of additional judge.

3. The judge appointed in pursuance of this Act shall be in the same position as if he had been appointed a puisne Judge of the said High Court in pursuance of the Supreme Court of Judicature Acts, 1873 and 1875 ; and all the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, for the time being in force in relation to the qualification and appointment of puisne judges

of the said High Court, and to their tenure of office, and to their precedence, and to their salaries and pensions, and to the officers to be attached to the persons of such judges, and all other provisions relating to such puisne judges, or any of them, with the exception of such provisions as apply to existing judges only, shall apply to the additional judge appointed in pursuance of this section in the same manner as they apply to the other puisne judges of the said Court respectively. The judge appointed in pursuance of this Act shall be attached to the Chancery Division of the said High Court, subject to such power of transfer as is in the Supreme Court of Judicature Act, 1873, mentioned.

Act 1877, ss. 3—6.

Sect. 4. Style of judges.

4. And whereas it is expedient that a uniform style should be provided for the ordinary judges of the Court of Appeal and for the judges of the High Court of Justice (other than the Presidents of Divisions): Be it enacted, that the ordinary judges of the Court of Appeal shall be styled Lords Justices of Appeal, and the judges of the High Court of Justice (other than the Presidents of Divisions) shall be styled Justices of the High Court.

This section is amended by s. 8 of the Act of 1881, *post*, p. 164, which provides that the exception shall not apply to any judge who may hereafter be appointed President of the Probate and Divorce Division.

Sect. 5. Definition of puisne judge.

5. A puisne judge of the High Court of Justice means, for the purposes of this Act, a judge of the High Court of Justice other than the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron, and their successors respectively.

Sect. 6. Continuation until 1st Jan. 1879 of s. 34 of 38 & 39 Vict. c. 77.

6. Section thirty-four of the Supreme Court of Judicature Act, 1875, shall be construed as if the first day of January one thousand eight hundred and seventy-nine were therein inserted in lieu of the first day of January one thousand eight hundred and seventy-seven.

SUPREME COURT OF JUDICATURE (OFFICERS) ACT, 1879.

42 & 43 VICT. c. 78.

Act 1879. ss. 1—4.

An Act to amend the Supreme Court of Judicature Acts.

[15th August, 1879.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Sect. 1. Construction and short title of Act. 36 & 37 Vict. c. 66. 38 & 39 Vict. c. 77. 40 & 41 Vict. c. 9.

1. This Act shall be construed as one with the Supreme Court of Judicature Acts, 1873, 1875, and 1877, and may be cited together with those Acts as the Supreme Court of Judicature Acts, 1873 to 1879, and separately as the Supreme Court of Judicature (Officers) Act, 1879.

Sect. 2. Commencement of Act.

2. This Act shall, except where it is otherwise expressed, come into operation on the twenty-eighth day of October, one thousand eight hundred and seventy-nine, which day is in this Act referred to as the commencement of this Act.

See s. 22, *post*, p. 151, as to Rules of Court, with reference to the exception referred to in this section.

Sect. 3. Definition of "existing."

3. In this Act "existing" means existing at the commencement of this Act.

Central Office.

Sect. 4. Establishment of central office.

4. There shall be established a central office of the Supreme Court of Judicature.

Act 1879. ss. 5, 6.

Sect. 5. Certain offices amalgamated with central office.

5. There shall be concentrated in and amalgamated with the Central Office the following offices; namely,

The record and writ clerks office;
The enrolment office;
The report office;
The offices of the masters of the Queen's Bench, Common Pleas, and Exchequer Divisions, including the bills of sale office;
The offices of the associates in the Queen's Bench, Common Pleas, and Exchequer Divisions;
The Crown Office of the Queen's Bench Division;
The Queen's Remembrancer's office;
The office of the registrar of certificates of acknowledgments of deeds by married women;
The office of the registrar of judgments; and

such other offices of the Supreme Court as may from time to time be amalgamated with the central office by Rules of Court.

See O. LXA., *post*, p. 433, as to the distribution in the Central Office of the staff of the various transferred offices.

Sect. 6. Transfer of certain officers to central office.

6. There shall be transferred to the Central Office:—

(*a.*) The existing record and writ clerks;
The existing clerk of enrolments;
The existing clerks in the report office;
The existing masters of the Queen's Bench, Common Pleas, and Exchequer Divisions;
The existing associates in the Queen's Bench, Common Pleas, and Exchequer Divisions;
The existing Queen's Remembrancer;
The existing Queen's coroner and attorney, and the existing master of the Crown office other than the Queen's coroner and attorney;
The existing registrar of certificates of acknowledgment of deeds by married women; and
The existing registrar of judgments;

with their respective clerks and messengers, or the clerks and messengers employed in their respective offices:

(*b.*) Such of the existing officers employed under the registrars of the Probate, Divorce, and Admiralty Division as the judges of that Division respectively select as necessary for the performance of the duties to be performed in the central office; and

(*c.*) Such other officers of and persons employed in the Supreme Court or the offices thereof as are from

Act 1879, ss. 6—8.

time to time transferred to the central office by rules of court.

Sect. 7. Central office to be under control of masters of Supreme Court.

7. The central office shall be under the control and superintendence of officers called masters of the Supreme Court of Judicature.

Provided that the existing clerk of enrolments shall, as long as he continues to hold that office, retain his control and superintendence over the business heretofore performed in his office and over the persons for the time being employed in the performance of that business.

The office of clerk of enrolments is to be abolished on the next vacancy. See s. 14, *post*, p. 148, and Schedule I. to this Act, *post*, p. 154.

Sect. 8. First masters of Supreme Court.

8. (1.) The first masters of the Supreme Court of Judicature shall be:—

The existing masters of the Queen's Bench, Common Pleas, and Exchequer Divisions;

The existing Queen's coroner and attorney;

The existing master of the Crown office other than the Queen's coroner and attorney;

The existing record and writ clerks; and

The existing associates in the Queen's Bench, Common Pleas, and Exchequer Divisions.

(2.) The salaries of the first masters of the Supreme Court shall be:—

(*a.*) In the case of each existing master of the Queen's Bench, Common Pleas, or Exchequer Divisions the salary to which he is entitled as such master at the commencement of this Act;

(*b.*) In the case of the existing Queen's coroner and attorney, and the existing master of the Crown office other than the Queen's coroner and attorney, the yearly sum of fifteen hundred pounds:

(*c.*) In the case of every other master of the Supreme Court, the salary to which he would have been entitled if he had been appointed a master of the Queen's Bench, Common Pleas, or Exchequer Division, immediately before the commencement of this Act.

(3.) A vacancy in the office of any master of the Supreme Court other than a master being Queen's coroner and attorney or master of the Crown office, shall not be filled until the number of masters is reduced to eighteen.

9. (1.) The right of filling any vacancy in the office of master of the Supreme Court, or in any clerkship in the central office, shall, subject as in the next sub-section mentioned, be vested in the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, in rotation, and in such order as they by agreement among themselves determine. Sect. 9. Appointment and removal of officers of central office.

(2.) The right of filling any vacancy in the office of Queen's coroner and attorney, and of master in the Crown office, shall be vested in the Lord Chief Justice of England, and the persons appointed to these offices respectively shall be by virtue of their appointment masters of the Supreme Court.

(3.) Subject as aforesaid, the right of filling any vacancy in, and of making any new appointment in, or for the purposes of, the central office shall be vested in the Lord Chancellor, with the concurrence of the Treasury.

(4.) Any officer of the central office may be removed by a majority of the judges mentioned in this section, with the approval of the Lord Chancellor, for reasons to be assigned in the order of removal.

By s. 21 of the Act of 1881, *post*, p. 170, notice of any vacancy in any office of the Supreme Court is to be given to the Lord Chancellor and the Treasury, and no new appointment is to be made within a month without the assent of the Lord Chancellor and the Treasury. See s. 15, *post*, p. 149, and note thereto.

Sect. 10. Qualification of masters of Supreme Court.

10. A person shall not be qualified to be appointed a master of the Supreme Court unless he is or has been a practising barrister or solicitor of five years' standing, or has practised for five years as a special pleader or as a special pleader and barrister; but nothing in this section shall affect the qualification of any existing officer of the Supreme Court to be appointed to any office dealt with by this Act.

Sect. 11. Tenure of masters of Supreme Court.

11. Every master of the Supreme Court shall hold office during good behaviour.

Sect. 12. Business of central office.

12. (1.) The business to be performed in the central office shall, subject to rules of court, comprise all the business performed in the offices by or in pursuance of this Act amalgamated with the central office, and shall be distributed among the several officers of the central office in such manner as may be directed by rules of court.

Act 1879, ss. 12—14.

(2.) The several officers of the central office shall be interchangeable one with another, and shall be capable of performing and liable to perform the duties of each other in any department of the office, and generally shall perform such duties and have such powers in relation to the business of the Supreme Court as may be directed by rules of court, subject to this qualification, that the duties required to be performed by any officer transferred to the central office by or in pursuance of this Act shall, except as far as they are modified with his consent, be the same as or analogous to those which he performed before being so transferred.

(3.) Subject as aforesaid, all officers of the central office shall continue to perform the duties heretofore performed by them in their respective offices, and to have and exercise the powers heretofore vested in them, in the same manner, as nearly as may be, as if this Act had not passed.

See s. 77 of the Act of 1873, *ante*, p. 75, and note thereto.

Sect. 13. Classification of clerks of central office.

13. The clerks employed in the central office shall be classified as principal clerks, first-class clerks, second-class clerks, and copying clerks, or in such other manner as the Lord Chancellor, with the concurrence of the Treasury, from time to time directs.

Sect. 14. Abolition of certain offices and continuance of others.

14. (1.) The offices specified in the first part of the First Schedule to this Act are hereby abolished as from the commencement of this Act.

(2.) Each of the offices specified in the second part of the First Schedule to this Act shall be abolished on the occurrence of the next vacancy therein.

(3.) On and after the occurrence of the next vacancy in any of the offices specified in the third part of the First Schedule to this Act, the senior master for the time being of the Supreme Court shall hold and perform the duties of the office, with such additional salary in respect of the office of Queen's remembrancer as the Lord Chancellor, with the concurrence of the Treasury, may determine.

(4.) Provided as follows:

(*a.*) For the purposes of this section the existing masters of the Queen's Bench, Common Pleas, and Exchequer Divisions shall collectively rank as senior to the other first masters of the Supreme Court.

(*b.*) Subject as aforesaid, each of the first masters of the Supreme Court shall, for the purposes of this section, rank in seniority according to the date of his first appointment to an office in the Supreme Court, or in any court of which the jurisdiction has been transferred to the Supreme Court. Act 1879, ss. 14—16.

Salaries and Pensions.

15. (1.) The salaries of the several officers of the Supreme Court shall be of such amounts as the Lord Chancellor, with the concurrence of the Treasury, from time to time determines, and every such officer shall be deemed to be, for the purposes of salary and pension, a permanent civil servant of the State. Sect. 15. As to salaries, pensions, &c., of officers of Supreme Court.

(2.) The salaries of all officers of the Supreme Court shall be paid out of money provided by Parliament.

Every pension and compensation shall be paid out of money provided by Parliament.

S. 85 of the Act of 1873, as to salaries and pensions, is repealed by this Act, and the provisions of this section are now substituted for it.

S. 77 of the Act of 1873, *ante*, p. 75, contains a power to increase the salaries of existing officers.

This section gives a general power to regulate the salaries of officers of the Supreme Court.

S. 14 of the Courts of Justice (Salaries and Funds) Act, 32 & 33 Vict. c. 91, enabled the Treasury, with the concurrence of the Lord Chancellor, and in the case of certain offices with the concurrence of certain other specified judges, to modify the salaries of officers in the Chancery, Bankruptcy, and Admiralty Courts.

S. 20 of the Act of 1881, *post*, p. 169, extends the provisions of the 32 & 33 Vict. c. 91, s. 14, to all officers of the Supreme Court and all officers in Lunacy, saving existing rights. S. 21, *post*, p. 170, defines the term "officer" for the purposes of that Act.

The effect of this legislation appears to be to modify subs. 1 of s. 15 in so far as it relates to the mode of fixing officers' salaries. In order to give effect to this change s. 21 of the Act of 1881, *post*, p. 170, provides that notice of any vacancy in any office must be given to the Lord Chancellor and the Treasury, and for one month the office must not be filled up without their assent.

16. The application for a pension under this Act shall be by a petition to the Lord Chancellor, setting forth the service and emoluments of the applicant in such form and with such particulars as the Lord Chancellor directs. Sect. 16. Mode of application for pension.

If the Lord Chancellor approves of the application he shall transmit it to the Treasury for their examination and award, and the Treasury shall thereupon inquire into the application, and if the claim made thereby is estab-

Act 1879, ss. 16—20.

lished to their satisfaction, shall award and direct payment of the pension to which the applicant is entitled.

This section reproduces the provisions of the 29 & 30 Vict. c. 68, s. 2, repealed by this Act.

Sect. 17. Power to declare office professional, and add years to service of holder thereof.

17. It shall be lawful for the Lord Chancellor from time to time to declare by writing signed by him that any office entitling to a pension under this Act is an office for the due and efficient discharge of the duties of which professional or other peculiar qualifications, not ordinarily to be acquired in the public service, are required, and that it is in the interest of the public that persons be appointed thereto at an age exceeding that at which public service ordinarily begins; and thereupon it shall be lawful for the Treasury to order that when the holder of any such office retires from public service, a specified number of years, not exceeding twenty, shall, in computing the amount of pension payable to the officer, be added to the number of years during which he has actually served.

22 Vict. c. 26.

Every such order shall have the same effect as an order or warrant made under section four of the Superannuation Act, 1859.

Sect. 18. Power for Lord Chancellor to remove disabled officer.

18. If any officer of the Supreme Court, being afflicted with any infirmity which disables him from the due execution of his office, refuses to resign or becomes incapable of resigning his office, it shall be lawful for the Lord Chancellor by order to remove him from his office.

Sect. 19. Provision as to persons entitled to pensions under previous Acts.

19. (1.) Where a person has at the commencement of this Act a right to succeed to an office to which a pension or superannuation allowance is attached under any previous Act, nothing in this Act shall prejudicially affect his right to claim a pension or allowance under that Act.

(2.) Any officer of the Supreme Court who is or might become entitled to a pension or superannuation allowance under any previous Act may, if he thinks fit, instead of claiming a pension or allowance under that Act, claim a pension under this Act, and thereupon the same proceedings shall be taken as if he had been entitled to a pension under this Act.

20. An officer of the Supreme Court appointed after the commencement of this Act shall not be entitled to a pension under this Act unless he has been admitted to his

office with a certificate from the Civil Service Commissioners. Act 1879, ss. 20—22.

Provided that the Lord Chancellor may from time to time, with the concurrence of the Treasury, make, revoke, and alter orders, declaring that this section shall not apply to any office or class of offices specified in the order, and the application of this section shall be limited in accordance with any such order. pensions under this Act.

See s. 17 of the Superannuation Act, 1859 (22 Vict. c. 26).

21. For the purposes of the provisions of this Act relating to salaries and pensions, an officer in lunacy shall be in the same position as if he were an officer of the Supreme Court. Sect. 21. Application of salary and pension provisions to officers in lunacy.

See s. 15 of this Act, *ante*, p. 149, and note thereto.

Rules of Court.

22. (1.) Section seventeen of the Supreme Court of Judicature Act, 1875, as amended by section seventeen of the Appellate Jurisdiction Act, 1876, shall extend to authorise the making, in pursuance of those sections, of rules of court under or for the purposes of this Act, and under or for the purposes of any Act passed after the passing of this Act which expressly or by implication authorises or directs the making of rules of court, and also under or for the purposes of any Act passed before the passing of this Act, which, so far as unrepealed, expressly or by implication authorises or directs the making of any orders, rules, or regulations for any purpose for which rules of court can be made under the above-mentioned sections, or for any similar purpose; provided that where the concurrence of the Treasury is required in making rules of court, or any such orders, rules, or regulations, rules of court under this section shall not be made without that concurrence. Sect. 22. Making rules of court. 38 & 39 Vict. c. 77. 39 & 40 Vict. c. 59.

(2.) Such rules of court as are requisite for bringing this Act into operation shall be made as soon as may be after the passing of this Act, but no rules of court made under this Act shall come into operation before the commencement of this Act.

As to Rules of Court in general, see s. 17 of the Act of 1875, *ante*, p. 109, and note thereto.

By numerous Acts of Parliament, rules for carrying their provisions into operation or otherwise supplementing them are directed to be made by various bodies of judges. The object of this section is to substitute the ordinary Rule Committee for these

Act 1879, ss. 22—26.

miscellaneous bodies. By this Act, and by the Civil Procedure Acts Revision Acts of 1879 and 1881 the provisions of several Acts, which designated various bodies of judges to make rules under them, have been repealed. These repeals bring into effect the provisions of this section.

Supplemental.

Sect. 23. Saving rights of officers transferred.

23. Subject to the express provisions of this Act, the officers transferred by or in pursuance of this Act shall have the same rank and hold their offices by the same tenure and upon the same terms and conditions, and receive the same salaries, and, if entitled to pensions, be entitled to the same pensions, as if this Act had not passed.

See s. 77 of the Act of 1873, *ante*, p. 75.

Sect. 24. Doubts as to status, &c. of officers to be determined by rules of court.

24. Where a doubt exists as to the position under this Act of any existing officer affected by this Act, or whether any person is an officer of the Supreme Court within the meaning of this Act, the doubt may be determined by rules of court, subject to this proviso, that a rule of court made under this section shall not alter the tenure of office, rank, pension, if any, or salary of the officer, or require him without his consent to perform any duties other than duties analogous to those which he has already performed.

See s. 81 of the Act of 1873, *ante*, p. 81. See O. LXIII., r. 2, *post*, p. 445, which under the powers given by this section defines the term "officer of the Supreme Court." See also s. 21 of the Act of 1881, *post*, p. 170.

Sect. 25. Compensation for prejudice to right or privilege. 26 & 29 Vict. c. 48.

25. If any person deems himself aggrieved by reason of any right or privilege, customary or otherwise, being prejudicially affected by this Act or the Courts of Justice Building Act, 1865, or any Act amending the same, or by anything done under any such Act, he may present a petition to the Lord Chancellor stating the circumstances of the case, and asking for the compensation to which the petitioner deems himself entitled; and if the Lord Chancellor thinks the petitioner entitled to compensation he shall transmit the petition to the Treasury, stating the grounds on which he thinks the petitioner so entitled, and the Treasury shall have discretion to award such compensation, if any, as in their opinion is just and reasonable.

Sect. 26.

26. Nothing in or done under this Act shall affect any

liability to the payment of fees payable to any officer or in any office affected by this Act, and all such fees shall, subject to any regulations with regard thereto which may from time to time be made by rules of court, continue to be payable in the same manner and to the same persons as heretofore. Act 1879, ss. 26—29. Saving as to payment of fees.

As to court fees, see s. 26 of the Act of 1875, *ante*, p. 116, and note thereto.

27. Any enactment or document referring to an officer or office abolished by or under this Act, shall, as far as it continues applicable, be construed as referring to the officer or office substituted by or under this Act, and rules of court may be made for determining what officer or office is so substituted. Sect. 27. Construction of enactments, &c. referring to officers or offices affected by this Act

See O. LX., r. 3, *post*, p. 445, which has been made under the power given by this section.

28. The buildings erected under the Courts of Justice Building Act, 1865, and the Courts of Justice Concentration (Site) Act, 1865, together with all additions thereto, shall be styled the Royal Courts of Justice. Sect. 28. Name of new law courts. 28 & 29 Vict. c. 48. 28 & 29 Vict. c. 49.

29. Whereas by reason of the provisions of the Supreme Court of Judicature Act, 1873, and the Acts amending the same, including this Act, divers enactments relating to officers and offices of the Supreme Court, and to the making of orders, rules and regulations, for purposes connected with the Supreme Court, have become unnecessary, and it is expedient that they be specifically repealed, therefore the Acts specified in the Second Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule: Sect. 29. Repeal of enactments in Second Schedule. 36 & 37 Vict. c. 66. Section 14. Section 29.

Provided that—

(1.) This repeal shall not affect—

(*a.*) Anything done or suffered before the commencement of this Act under any enactment repealed by this Act; or

(*b.*) Any right, duty, or liability acquired, imposed, or incurred by or under any enactment hereby repealed; or

(*c.*) Any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment hereby repealed; or

(*d.*) The institution or prosecution to its termination

Act 1879, s. 39.

of any legal proceeding, or other remedy for ascertaining, enforcing, or recovering any such liability, penalty, forfeiture, or punishment as aforesaid; or

(*c.*) The validity of any rule, order, or regulation made under any enactment hereby repealed; and

(2.) In particular, but without prejudice to the generality of the foregoing provisions, the repeal effected by this section shall not deprive any person who at the commencement of this Act enjoys any compensation, pension, retiring annuity, superannuation allowance, or salary mentioned in any enactment repealed by this section, of his right to receive the same compensation, pension, retiring annuity, superannuation allowance, or salary, or of any right he may have to receive any progressive or prospective increase of salary, or to obtain any promotion, or succession, or any pension, retiring annuity, or superannuation allowance, or affect or diminish any such right, or affect any right of appointment vested in any existing judge, or alter the duties, conditions, or restrictions attached to any office held by any existing officer; and

(3.) This repeal shall not revive any enactment, right, office, privilege, matter, or thing not in force or existing at the commencement of this Act.

Schedules.

SCHEDULES.

Sect. 14.

FIRST SCHEDULE.

First Part.

Offices to be abolished as from commencement of Act.

The offices of—

Record and Writ Clerk:
Master in the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court of Justice:
Associate in the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court of Justice.

SECOND PART.

Offices to be abolished on next vacancy.

The offices of—

Clerk of Enrolments:
Clerk of Petty Bag.

THIRD PART.

Offices to be filled on vacancy by the Senior Master of the Supreme Court.

The offices of—

Queen's Remembrancer:
Registrar of Certificates of Acknowledgments of Deeds by Married Women:
Registrar of Judgments.

SECOND SCHEDULE.

ENACTMENTS REPEALED.

A description or citation of a portion of an Act in this Schedule is inclusive of the word, section, or other part first or last mentioned or otherwise referred to as forming the beginning or as forming the end of the portion described in the description or citation.

Year and Chapter.	Title or Short Title.	Extent of repeal.
29 Chas. 2, c. 5.	An Act for takeing of affidavits in the country to be made use of in the Courts of Kings Bench, Common Pleas and Exchequer	The whole Act.
53 Geo. 3, c. 24.	An Act to facilitate the administration of justice.	Section five.
11 Geo. 4 & 1 Will. 4, c. 58.	An Act for regulating the receipt and future appropriation of fees receivable by officers of the Superior Courts of Common Law.	The whole Act.

Act 1879. Sched. II.

Year and Chapter.	Title or Short Title.	Extent of repeal.
11 Geo. 4 & 1 Will. 4, c. 70.	An Act for the more effectual administration of justice in England and Wales.	Section eleven.
1 Will. 4, c. 7.	An Act for the more speedy judgment and execution in actions brought in His Majesty's Courts of Law at Westminster, and in the Courts of Common Pleas of the county Palatine of Lancaster; and for amending the law as to judgment on a cognovit actionem in cases of bankruptcy.	Section six.
2 & 3 Will. 4, c. 39, s. 15.	An Act for uniformity of process in personal actions in His Majesty's Court of Law at Westminster.	Section fifteen.
3 & 4 Will. 4, c. 74.	An Act for the abolition of fines and recoveries and for the substitution of more simple modes of assurance.	Section seventy-five and section eighty-nine to "lodged."
3 & 4 Will. 4, c. 94.	An Act for the regulation of the proceedings and practice of certain offices of the High Court of Chancery in England.	Section nine, section ten from "and it shall be lawful" to end of section, sections twenty-one, twenty-two, twenty-three, thirty-three and thirty-four and the schedule.
3 & 4 Will. 4, c. 99.	An Act for facilitating the appointment of sheriffs and the more effectual audit and passing of their accounts; and for the more speedy return and recovery of fines, issues, forfeited recognizances, penalties, and deodands; and to abolish certain offices in the Court of exchequer.	Section forty-six.
7 Will. 4, & 1 Vict. c. 30.	An Act to abolish certain offices in the Superior Courts of	The whole Act, except section nine, sections thirteen, fifteen and

Year and Chapter.	Title or Short Title.	Extent of repeal.
	Common Law, and to make provision for a more effective and uniform establishment of officers in those courts.	nineteen, and twenty-eight.
3 & 4 Vict. c. 66.	An Act to make provision for the judge registrar and marshall of the High Court of Admiralty of England.	The whole Act, except sections one and seven.
5 Vict. c. 5.	An Act to make further provisions for the administration of justice.	Sections eighteen, twenty-six, thirty-five, section thirty-eight from "and that each" to end of section, section thirty-nine, from the beginning to "general order direct; and that", sections forty-six and forty-seven, section forty-eight from "and that they" to end of section, and sections forty-nine and fifty-six.
5 & 6 Vict. c. 86.	An Act for abolishing certain offices on the Revenue side of the Court of Exchequer in England, and for regulating the office of Her Majesty's Remembrancer in that court.	Sections two and four.
5 & 6 Vict. c. 103.	An Act for abolishing certain offices of the High Court of Chancery in England.	Section three from the beginning to "one "thousand two hun-"dred pounds per "annum and", from "shall be entitled "under this Act" to "and taxing master", and from "and may "be removed" to end of section. Sections four and five. Sections six and eleven, except so far as they relate to a taxing master, and

Act 1879, Sched. II.

Year and Chapter.	Title or Short Title.	Extent of repeal.
		sections nine, fourteen, eighteen, nineteen, thirty-one, and thirty-two.
6 & 7 Vict. c. 20.	An Act for abolishing certain offices on the Crown side of the Court of Queen's Bench, and for regulating the Crown Office.	The whole Act, except sections six and eleven.
6 & 7 Vict. c. 38.	An Act to make further regulations for facilitating the hearing appeals and other matters by the Judicial Committee of the Privy Council.	Section thirteen.
6 & 7 Vict. c. 67.	An Act to enable parties to sue out and prosecute writs of error in certain cases upon the proceedings on writs of mandamus.	Section four.
10 & 11 Vict. c. 96.	An Act for better securing trust funds and for the relief of trustees.	Section four.
12 & 13 Vict. c. 109.	The Petty Bag Office and Enrolment in Chancery Amendment Act, 1849.	Section forty-one.
13 & 14 Vict. c. 35.	An Act to diminish the delay and expense of proceedings in the High Court of Chancery in England.	Sections thirty to thirty-two.
13 & 14 Vict. c. 75.	An Act to regulate the receipt and amount of fees receivable by certain officers in the Court of Common Pleas.	The whole Act.
14 & 15 Vict. c. 83.	An Act to improve the administration of justice in the Court of Chancery and in the Judicial Committee of the Privy Council.	Sections two and twelve, section twenty-one from "and shall be subject" to "by the said Act", and sections twenty-two and twenty-three.
15 & 16 Vict. c. 73.	An Act to make provision for a permanent establishment of	The whole Act except section eleven, and section twenty-six.

Year and Chapter.	Title or Short Title.	Extent of repeal
	officers to perform the duties at Nisi Prius in the Superior Courts of Common Law, and for the payment of such officers and of the judges clerks by salaries, and to abolish certain offices in those courts.	
15 & 16 Vict. c. 76.	The Common Law Procedure Act, 1852.	Sections two hundred and twenty-four and two hundred and twenty-five.
15 & 16 Vict. c. 80.	An Act to abolish the office of Master in Ordinary of the High Court of Chancery, and to make provision for the more speedy and efficient despatch of business in the said Court.	Sections five, twenty-five, thirty-eight, forty-four, forty-five, forty-six, fifty, fifty-four, fifty-five, and fifty-seven.
15 & 16 Vict. c. 86.	An Act to amend the practice and course of proceeding in the High Court of Chancery.	Sections sixty-three and sixty-four.
15 & 16 Vict. c. 87.	An Act for the relief of the suitors of the High Court of Chancery.	Sections one, twenty-three, twenty-nine, thirty-seven, thirty-eight, forty-six, and forty-seven.
16 & 17 Vict. c. 22.	An Act for making further provision for the execution of the office of examiner of the High Court of Chancery.	Section three.
16 & 17 Vict. c. 70.	The Lunacy Regulation Act, 1853.	Sections thirteen and fourteen, and section fifteen from "and the present officers" to end of section.
17 & 18 Vict. c. 78.	An Act to appoint persons to administer oaths and to substitute stamps in lieu of fees, and for other purposes in the High Court of Admiralty of England.	Sections three, four and twenty-two.
17 & 18 Vict. c. 125.	The Common Law Procedure Act, 1854.	Sections ninety-seven and ninety-eight.

Act 1879.
Sched. II.

Year and Chapter.	Title or Short Title.	Extent of repeal.
18 & 19 Vict. c. 126.	An Act for diminishing expense and delay in the administration of justice in certain cases.	Section twenty.
18 & 19 Vict. c. 134.	An Act to make further provision for the more speedy and efficient despatch of business in the High Court of Chancery, and to vest in the Lord Chancellor the ground and buildings of the said Court situate in Southampton Buildings, Chancery Lane, with powers of leasing and sale thereof.	Sections five, six, eight, and twelve.
19 & 20 Vict. c. 97.	The Mercantile Law Amendment Act, 1856.	Section fifteen so far as it incorporates any enactment repealed by this Act.
20 & 21 Vict. c. 77.	An Act to amend the law relating to probates and letters of administration in England.	Sections eight, fourteen, and eighteen, section nineteen from "subject to be removed" to end of section, and sections one hundred and two to one hundred and six, and one hundred and eleven to one hundred and thirteen.
20 & 21 Vict. c. 85.	An Act to amend the law relating to divorce and matrimonial causes in England.	Sections fourteen, sixty-two, and sixty-eight.
21 & 22 Vict. c. 27.	The Chancery Amendment Act, 1858.	Section eleven.
22 & 23 Vict. c. 21.	An Act to regulate the office of Queen's Remembrancer and to amend the practice and procedure on the Revenue side of the Court of Exchequer.	Sections one to five, and section forty-one.
23 & 24 Vict. c. 126.	The Common Law Procedure Act, 1860.	Sections thirty-seven and thirty-eight.
23 & 24 Vict. c. 128.	An Act to enable the Lord Chancellor and Judges of the Court of Chancery to carry	The whole Act.

Year and Chapter.	Title or Short Title.	Extent of repeal.
	into effect the recommendations and suggestions of the Chancery Evidence Commissioners by general rules and orders of the Court.	
23 & 24 Vict. c. 149.	An Act to make better provision for the relief of prisoners in contempt of the High Court of Chancery, and pauper defendants, and for the more efficient despatch of business in the said Court.	Sections twelve and fourteen.
25 & 26 Vict. c. 96.	An Act to render tenable during good behaviour the office of the officer of the Court of Common Pleas by whom the certificates of acknowledgment of deeds of married women are filed of record.	The whole Act.
28 & 29 Vict. c. 45.	The Common Law Courts (Fees) Act, 1865.	The whole Act.
29 & 30 Vict. c. 68.	The Superannuation Act, 1866.	The whole Act, so far as it applies to officers of the Supreme Court or to officers in Lunacy.
29 & 30 Vict. c. 101.	The Common Law Courts (Fees and Salaries) Act, 1866.	The whole Act.
30 & 31 Vict. c. 87.	The Court of Chancery (Officers) Act, 1867.	Section eight from "and shall be subject" to "same Act", and sections nine and ten.
32 & 33 Vict. c. 91.	The Courts of Justice (Salaries and Funds) Act, 1869.	Sections sixteen to twenty-eight.
36 & 37 Vict. c. 66.	The Supreme Court of Judicature Act, 1873.	Section eighty-five.
40 & 41 Vict. c. 18.	The Settled Estates Act, 1877.	Section forty-two from "so far as relates to "proceedings in "England" to the "first specified there-"in, and."

SUPREME COURT OF JUDICATURE ACT, 1881.

44 & 45 VICT., c. 68.

Act 1881, ss. 1, 2.

An Act to amend the Supreme Court of Judicature Acts; and for other purposes.

[27th August, 1881.]

WHEREAS it is expedient to amend the constitution of Her Majesty's Court of Appeal, and to make further provision concerning the Supreme Court of Judicature and the officers thereof, and such other matters as are hereinafter mentioned:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Sect. 1. Short title.

1. This Act may be cited as the Supreme Court of Judicature Act, 1881.

Sect. 2. Master of the Rolls to be Judge of appeal only.

2. From and after the passing of this Act the present and every future Master of the Rolls shall cease to be a judge of Her Majesty's High Court of Justice, but shall continue, by virtue of his office, to be a judge of Her Majesty's Court of Appeal, and shall retain the same rank, title, salary, right of pension, patronage, and powers of appointment or dismissal, and all other powers, privileges, and disqualifications now and heretofore belonging to the said office of Master of the Rolls and all other duties of the said office except that of a judge of Her Majesty's High Court of Justice: Provided that the present Master of the Rolls shall not by virtue of this Act be subject to any disqualification to which he is not by law now subject, nor shall be required to act

under any commission of assize, nisi prius, oyer and terminer, or gaol delivery; and the existing personal officers of the Master of the Rolls shall continue to be attached to him and be under his authority, and to hold their respective offices upon the same tenure and in the same manner in all respects as if this Act had not passed: Provided also, that any Master of the Rolls to be hereafter appointed shall be under an obligation to go circuits and to act as a commissioner under commissions of assize, or other commissions authorised to be issued in pursuance of the Supreme Court of Judicature Act, 1873, in the same manner in all respects as he would have been under the last-mentioned Act, or any Acts or Act amending the same, if he had continued to be a judge of the Chancery Division of the High Court of Justice.

See s. 4 of the Act of 1875, *ante*, p. 96, and note thereto.

Sect. 3. Existing vacancy in Court of Appeal not to be filled up.

3. The vacancy now existing among the ordinary judges of the said Court of Appeal shall not be filled up, and the number of ordinary judges of that Court shall henceforth be five.

See s. 4 of the Act of 1875, *ante*, p. 96, and note thereto.

Sect. 4. President of Probate Division to be an ex-officio judge of Court of Appeal.

4. The President for the time being of the Probate, Divorce, and Admiralty Division of the High Court of Justice shall henceforth be an *ex officio* judge of Her Majesty's Court of Appeal with the same powers, and in the same manner in all respects as the other *ex officio* judges thereof; he shall not be entitled in the said Court to any precedence over any existing judge to which he would not have been entitled as a judge of the Supreme Court of Judicature if this Act had not passed.

See s. 4 of the Act of 1875, *ante*, p. 96, and note thereto.

Sect. 5. New judge of High Court instead of Master of the Rolls.

5. It shall be lawful for Her Majesty to supply the vacancy in the High Court of Justice, to be occasioned by the removal therefrom of the Master of the Rolls, by the appointment, immediately after the passing of this Act, and from time to time afterwards, of a judge, who shall be in the same position as if he had been appointed a puisne judge of the said High Court in pursuance of the Judicature Acts, 1873 and 1875; and all the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, for the time being in force in relation to the qualification and appointment of puisne judges of the said High Court, and to their duties and tenure of office, and

36 & 37 Vict. c. 66. 38 & 39 Vict. c. 77.

Act 1881, ss. 5—8.

to their precedence, and to their salaries and pensions, and to the officers to be attached to the persons of such judges, and all other provisions relating to such puisne judges, or any of them, with the exception of such provisions as apply to existing judges only, shall apply to the judge appointed in pursuance of this section, in the same manner as they apply to the other puisne judges of the said High Court respectively. The judge so appointed shall be attached to the Chancery Division of the said High Court, subject to such power of transfer as is in the Supreme Court of Judicature Act, 1873, mentioned.

Sect. 6. Judge under 40 & 41 Vict. c. 9.

6. The power given to Her Majesty by the Supreme Court of Judicature Act, 1877, to appoint a judge of the High Court of Justice in addition to the number of judges authorised to be appointed by the Supreme Court of Judicature Acts, 1873 and 1875, may be exercised by Her Majesty from time to time, so as at all times to make due provision for the business of the Chancery Division of the High Court of Justice: Provided that no such appointment shall be made unless or until the number of judges attached for the time being to the Chancery Division of the High Court, other than the Lord Chancellor, is, by death, resignation, or otherwise, reduced below five.

See s. 2 of the Act of 1877, *ante*, p. 142, and note thereto.

Sect. 7. Rolls Court Chambers and clerks, &c.

7. The Lord Chancellor shall have power by order under his hand to direct that the court and chambers, heretofore used by the Master of the Rolls as a judge of the Chancery Division of the High Court of Justice, shall (so long as may be necessary or convenient) be used by such judge of the said Chancery Division of the said High Court as shall be in any such order in that behalf named; and the chief and other clerks, and other officers, heretofore attached to the said court and chambers respectively, shall (subject to any rules or orders of court) be and continue attached to the judge to be named in any such order, and, after such court and chambers shall have ceased to be so used, to the judge to whom the business previously transacted in such court and chambers respectively shall be for the time being assigned.

Sect. 8. Title of Justices

8. And whereas it is expedient to amend section four of the Supreme Court of Judicature Act, 1877: Be it enacted that the exception of Presidents of Divisions

from the enactment that the judges of the High Court of Justice shall be styled justices of the High Court shall not apply to any judge to be hereafter appointed who may be or become President of the Probate, Divorce, and Admiralty Division of the High Court of Justice.

Act 1881, ss. 8—10.

40 & 41 Vict. c. 9.

See s. 4 of the Act of 1877, *ante*, p. 96.

Sect. 9. Appeals under Divorce Act

9. All appeals which, under section fifty-five of the Act of the twentieth and twenty-first years of Her present Majesty, chapter eighty-five, or under any other Act, might be brought to the full court established by the said first-mentioned Act, shall henceforth be brought to Her Majesty's Court of Appeal and not to the said full court.

The decision of the Court of Appeal on any question arising under the Acts relating to divorce and matrimonial causes, or to the declaration of legitimacy, shall be final, except where the decision either is upon the grant or refusal of a decree on a petition for dissolution or nullity of marriage, or for a declaration of legitimacy, or is upon a question of law on which the Court of Appeal give leave to appeal; and, save as aforesaid, no appeal shall lie to the House of Lords under the said Acts.

Subject to any order made by the House of Lords, in accordance with the Appellate Jurisdiction Act, 1876, every appeal to the House of Lords against any such decision shall be brought within one month after the decision appealed against is pronounced by the Court of Appeal if the House of Lords is then sitting, or, if not, within fourteen days after the House of Lords next sits.

This section, so far as is consistent with the tenor thereof, shall be construed as one with the said Acts.

The jurisdiction of the Full Court of Divorce as established under the Divorce Acts was not one of the jurisdictions vested in the Court of Appeal by s. 18 of the Act of 1873, and it was therefore held that that court still existed, and that in Divorce cases no appeal lay to the Court of Appeal: *Westhead* v. *Westhead*, 2 P. D. 1, C. A.; *Wallis* v. *Wallis*, 2 P. D. 141, C. A. The Act of 1881 removes this anomaly, and Divorce appeals, when they lie, will henceforth go to the Court of Appeal.

As to the right of appeal given by the Divorce Acts, see 20 & 21 Vict. c. 85, s. 55, 21 & 22 Vict. c. 108, s. 18, and 23 & 24 Vict. c. 144, ss. 1, 2. See also the next section.

Sect. 10. As to appeal against decrees nisi for

10. No appeal from an order absolute for dissolution or nullity of marriage shall henceforth lie in favour of any party who, having had time and opportunity to

Act 1881, ss. 10—13.

appeal from the decree nisi on which such order may be founded, shall not have appealed therefrom.

dissolution or nullity of marriage.

See note to last section.

Sect. 11. Qualification of judges to sit on appeals.

11. A judge who was not present and acting as a member of a divisional court of the High Court of Justice, at the time when any decision which may be appealed from was made, or at the argument of the case decided, shall not, for the purposes of the fourth section of the Supreme Court of Judicature Act, 1875, be deemed to be, or to have been, a member of such divisional Court.

See s. 4 of the Act of 1875, *ante*, p. 96, and note thereto.

Sect. 12. In cases of urgency, &c. one judge may officiate or another.

12. In any case of urgency arising during the absence from illness or any other cause or during any vacancy in the office of any judge of the High Court of Justice to whom any cause or matter may have been, according to the course of the said court, or of any division thereof, specially assigned, it shall be lawful for any other judge of the said court, who may consent so to do, to hear and dispose of any application for an injunction or other interlocutory order for or on behalf of the judge so absent, or in the place of the judge whose office may have so become vacant.

This section supplements the power given by s. 51 of the Act of 1873, *ante*, p. 61.

Sect. 13. Selection of judges for trial of election petitions. 31 & 32 Vict. c. 125.

13. The judges to be placed on the rota for the trial of election petitions in England in each year, under the provisions of the Parliamentary Elections Act, 1868, or any Act amending the same, shall henceforth be selected out of the judges of the Queen's Bench Division of the High Court of Justice in such manner as may be provided by any Rules of Court to be made for that purpose; and, subject thereto, shall be selected as follows; (that is to say,) the judges of the Queen's Bench Division of the said High Court shall, on or before the fourth day of November in every year, select, by a majority of votes, three of the puisne judges of such Division (none of whom shall be a member of the House of Lords) to be placed on the rota for the trial of election petitions during the ensuing year.

If in any case the judges of the said Division, present at the time of their meeting to make such selection, are equally divided in their choice of any judge to be placed on the rota, the Lord Chief Justice of England, or, in

case of his absence, the senior judge then present, shall have a second or casting vote. Act 1881, ss. 13, 14.

The choice of a judge to fill any occasional vacancy upon the rota, or to assist the judge on the rota as an additional judge, shall be made in like manner.

The judges, who at the time of the passing of this Act shall be upon the rota for the trial of election petitions, shall continue upon such rota until the end of the year for which they have been appointed, in the same manner as if this Act had not passed.

If at the end of the year for which any such judge shall have been appointed, whether before or after the passing of this Act, any trial or other matter shall be pending before him, either alone or together with any other judge, and not concluded, or if, after the conclusion of any such trial or of the hearing of any such matter, judgment shall not have been given thereon, it shall be lawful for every such judge to proceed with and to conclude such pending trial or other matter, and to give judgment thereon, after the end of such year, in the same manner in all respects as if the year for which he was appointed had not expired.

This section appears to supersede, though it does not expressly repeal, s. 38 of the Act of 1873, *ante*, p. 50.

By s. 2 of the Parliamentary Elections and Corrupt Practices Act, 1879 (42 & 43 Vict. c. 75) election petitions are to be tried before two judges instead of one as heretofore.

Sect. 14. Jurisdiction of High Court in registration and election cases. 28 & 29 Vict. c. 36. 31 & 32 Vict. c. 125. 35 & 36 Vict c. 60. 41 & 42 Vict. c. 26.

14. The jurisdiction of the High Court of Justice to decide questions of law, upon appeal or otherwise, under the Act of the sixth and seventh years of Her Majesty, chapter eighteen, the County Voters Registration Act, 1865, the Parliamentary Elections Act, 1868, the Corrupt Practices (Municipal Elections) Act, 1872, the Parliamentary and Municipal Registration Act, 1878, or any of the said Acts, or any Act amending the same respectively, shall henceforth be final and conclusive, unless in any case it shall seem fit to the said High Court to give special leave to appeal therefrom to Her Majesty's Court of Appeal, whose decision in such case shall be final and conclusive.

See s. 19 of the Act of 1873, *ante*, p. 13, and note thereto. In *Harmon* v. *Park*, 6 C. P. D. 323, C. A., before this Act, it was held that an appeal lay from an interlocutory order of a Divisional Court relating to a Municipal Election Petition. It seems doubtful whether an interlocutory order is a decision on a question of law within the meaning of this section.

Act 1881, ss. 15—18.

Sect. 15. Quorum in Court of Criminal Appeal.

15. The jurisdiction and authority in relation to questions of law arising in criminal trials, which, under section forty-seven of the Supreme Court of Judicature Act, 1873, is now vested in the judges of the High Court of Justice, may be exercised by any five or more of such judges, notwithstanding the abolition of the offices of Lord Chief Justice of the Common Pleas and Lord Chief Baron of the Exchequer; provided that the Lord Chief Justice of England shall always be one of such judges, unless, by writing under his hand or by the certificate in writing of his medical attendant, it shall appear that he is prevented, by illness or otherwise, from being present at any court duly appointed to be held for the purpose aforesaid, in which case the presence of the said Lord Chief Justice at such court shall not be necessary.

See s. 47 of the Act of 1873, *ante*, p. 58.

Sect. 16. Proceedings with regard to nomination of sheriffs. 24 Geo. 2, c. 48.

16. The proceedings for the ordaining or nominating of sheriffs, directed by an Act passed in the fourteenth year of King Edward the First, intituled "How long a Sheriff shall tarry in his Office," and by another Act passed in the twenty-fourth year of King George the Second, intituled "An Act for the abbreviation of Michaelmas Term," to take place at the Exchequer, shall henceforth in every year take place in the Queen's Bench Division of the High Court of Justice, at the same time and in the same manner as hath been heretofore accustomed in the Court of Exchequer.

Sect. 17. Presentation and swearing of Lord Mayor of London.

17. The presentation and swearing of the Lord Mayor of the city of London, which has heretofore taken place in the Court of Exchequer at Westminster after every annual election into that office, pursuant to charters granted by Her Majesty's Royal predecessors to the citizens of London, and to the herein-before recited Act of King George the Second, shall henceforth take place in the Queen's Bench Division of Her Majesty's High Court of Justice, or before the judges of that Division, at the same time and in the same manner as hath been heretofore accustomed in the Court of Exchequer.

Sect. 18. As to fixing Sessions of Central Crimina Court

18. The power of making general orders for fixing the times of holding sessions of the Central Criminal Court established by the Act of the fourth and fifth years of King William the Fourth, chapter thirty-six, which by section fifteen of that Act was given to any eight or more of the judges of the Superior Courts of Westminster,

may henceforth be exercised from time to time by any four or more of the judges of Her Majesty's High Court of Justice.

Sect. 19. Power to make rules under 39 & 40 Vict c. 59.

19. The power of making Rules of Court, conferred by section seventeen of the Appellate Jurisdiction Act, 1876, upon the several judges therein mentioned, shall henceforth be vested in and exercised by any five or more of the following persons, of whom the Lord Chancellor shall be one; namely, the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice, and four other judges of the Supreme Court of Judicature to be from time to time appointed for the purpose by the Lord Chancellor in writing under his hand, such appointment to continue for such time as shall be specified therein.

This section alters the constitution of the Rule Committee of judges as fixed by the Act of 1876. That Act had amended s. 17 of the Act of 1875. See *ante*, p. 110.

Sect. 20. Extension of 32 & 33 Vict. c. 91. s. 14.

20. The provisions of section fourteen of the Courts of Justice (Salaries and Funds) Act, 1869, shall henceforth be applicable to all officers of the Supreme Court of Judicature and all officers in Lunacy in the same manner and subject to the same conditions as is thereby enacted concerning the officers in the Courts of Chancery, Bankruptcy, and Admiralty: Provided always, that any order to be made by the Treasury as to any officers not heretofore included within that section of the said Act, shall be made with the concurrence of the Lord Chancellor, and also in the case of officers who are appointed by any other persons or person than the Lord Chancellor either solely or jointly with the Lord Chancellor, with the concurrence of the persons or person having such power of appointment: Provided also, that no order made under this Act which would not have been heretofore authorised by the said section or otherwise by law shall without his consent apply to any officer holding any office at the time of the commencement of this Act.

Salaries and Funds Act, 1869.

By s. 14 of the Courts of Justice (Salaries and Funds Act) 1869— "The Treasury may from time to time by order made with the concurrence of the Lord Chancellor, and also with the concurrence of the Master of the Rolls in the case of officers who are appointed or whose salaries are fixed by the Master of the Rolls either solely or jointly with the Lord Chancellor, and with the concurrence of the judge of the Court of Admiralty in the case of the officers of that court, increase or diminish the number of officers in the

Act 1881, ss. 20—22.

Courts of Chancery, Bankruptcy and Admiralty, and the amounts of the salaries of such officers, and determine the conditions on which they are to hold their offices, and regulate the expenses and contingencies incurred in respect of the said courts or the officers belonging thereto.

"An officer appointed after the commencement of this Act shall take his office subject to any order that may thereafter be made under this section in relation to the abolition or modification of his office, but no order made under this section, shall, without his consent, apply to any officer holding office at the date of the commencement of this Act, and when the conditions on which any officer is to hold his office, and the salary to be paid to him has been determined by any order under this section for the time being in force, no subsequent order under this section shall apply to such officer without his consent.

"Any order made under this section shall be laid before both Houses of Parliament within fourteen days after it is made if Parliament be then sitting, or if not, within fourteen days after the commencement of the next session. It shall also be published in the *London Gazette*, and when so published shall be of the same force as if it were enacted in this Act, but subject to being varied or repealed from time to time by other orders made in like manner under this Act and any enactment inconsistent with such order shall be repealed from and after the date of any such publication.

"The term 'officer' in this section means all officers, clerks, messengers and persons who are mentioned in the second parts of the third and fourth schedules of this Act, or who are for the time being employed in the said Courts of Chancery, Bankruptcy and Admiralty, or any of them, or the offices connected therewith."

Sect. 21. Notice of vacancies in offices of Supreme Court.

21. Upon the occurrence henceforth of any vacancy in any office of the Supreme Court of Judicature notice thereof shall be forthwith given to the Lord Chancellor and also to the Treasury by the senior continuing or surviving officer of the department in which the vacancy shall occur, and no appointment shall be made to fill such vacancy within the period of one month next after the date of such notice without the assent of the Lord Chancellor, given with the concurrence of the Treasury; and the Lord Chancellor may, if it be necessary, make provision for such manner as he thinks fit for the temporary discharge in the meantime of the duties of such office. The word "officer" in this Act shall not include the office of any judge of the Supreme Court of Judicature.

See s. 77 of the Act of 1873, *ante*, p. 75. and note thereto, and s. 9 of the Act of 1879, *ante*, p. 147.

Sect. 22. Appointment of district registrar.

22. And whereas by the Judicature Acts, 1873, 1875, and 1877, and the Supreme Court of Judicature (Officers) Act, 1879, no provision is made for the appointment of district registrars of the High Court of Justice other

than persons holding or having held the offices in section sixty of the Supreme Court of Judicature Act, 1873, and section thirteen of the Supreme Court of Judicature Act, 1875, respectively mentioned: Be it enacted, that if on any vacancy in the office of district registrar under the said Acts, or upon the appointment by any Order in Council to be hereafter made of any new district within which there shall be a district registrar (unless by such Order in Council it shall be otherwise directed), it shall appear to the Lord Chancellor, with the concurrence of the Treasury, that from the nature and amount of the business to be transacted by such district registrar it is expedient that such office should be conferred upon a person not so qualified as aforesaid, it shall be lawful for the Lord Chancellor, with the concurrence of the Treasury, to appoint to such office any solicitor of the Supreme Court of Judicature of not less than five years' standing.

Act 1881, ss. 23—24.

42 & 43 Vict. c. 78.

A district registrar shall not, either by himself or his partner, be directly or indirectly engaged as solicitor or agent for a party to any proceeding whatsoever in the district registry of which he is registrar.

See s. 60 of the Act of 1873, *ante*, p. 65, and note thereto.

Sect. 23. Appointments to keep order, &c., in Royal Courts of Justice.

23. The Lord Chancellor may from time to time, with the concurrence of the Treasury, make regulations with respect to—

(*a.*) The appointment, removal, payment, and duties of persons to keep order in the Royal Courts of Justice, provided that no such regulation shall affect any right of appointment enjoyed by any person at the time of the commencement of this Act, without his consent thereto:

(*b.*) The appointment, removal, payment, and duties of persons charged with the care and cleaning of the Royal Courts of Justice:

(*c.*) Any other matters necessary or incidental to the use or management of the Royal Courts of Justice. Any remuneration payable under this section shall be paid out of money voted by Parliament.

See s. 20 of this Act, *supra*, p. 169.

Sect. 24. Powers as to solicitors.

24. The powers which, by an Act passed in the session of the sixth and seventh years of Her present Majesty, intituled "An Act for consolidating and amending

6 & 7 Vict. c. 73.

Act 1881, ss. 24—26.

several of the laws relating to Attornies and Solicitors practising in England and Wales," and by section fourteen of the Supreme Court of Judicature Act, 1875, and by the Solicitors Act, 1860, and by the Solicitors Act, 1877, and by any Act amending the said Acts respectively, are vested in the Master of the Rolls jointly with the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer, or with any of them, or jointly with the Presidents of the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court, or with any of them, shall henceforth be vested in the Master of the Rolls, with the concurrence of the Lord Chancellor and the Lord Chief Justice of England, or (in case of difference) of one of them, and anything required by the said Acts to be done to or before the said Lord Chief Justices and Lord Chief Baron, or the said Presidents jointly with the Master of the Rolls, may be done to or before the Master of the Rolls, the Lord Chancellor, and the Lord Chief Justice of England.

23 & 24 Vict. c. 127.

40 & 41 Vict. c. 62.

Provision may be made by the Master of the Rolls, with the concurrence of the Lord Chancellor and the Lord Chief Justice of England, or (in case of difference) of one of them, for the care and custody of the Roll of Solicitors after the abolition of the office of Clerk of the Petty Bag.

Sect. 25. Chief Justice of England to have powers of Chief Justice of Common Pleas and Chief Baron of the Exchequer.

25. Where by any Statute any power is given to or any act is required or authorised to be done by the Lord Chief Justice of the Common Pleas and the Lord Chief Baron of the Exchequer, or either of them, either solely or jointly with the Lord Chief Justice of the Queen's Bench or the Lord Chief Justice of England, and either with or without the Lord Chancellor or any judge, officer, or person, such power may henceforth be exercised and such act done by the Lord Chief Justice of England; and where by any Statute the concurrence of the Lord Chief Justice of the Common Pleas and the Lord Chief Baron of the Exchequer, or either of them, is required for the exercise of any power, or the performance of any act, it shall be sufficient henceforth that the Lord Chief Justice of England shall concur therein.

See ss. 12 and 32 of the Act of 1873, *ante*, pp. 6 and 42, and notes thereto.

Sect. 26.

26. And whereas under the Act of the third and

fourth years of King William the Fourth, chapter seventy-four, the Lord Chief Justice of the Court of Common Pleas was empowered to appoint such proper persons as he should think fit to be perpetual Commissioners for taking the acknowledgments by married women of deeds to be executed by them as in the same Act provided, and such commissioners were made removable by and at the pleasure of the said Lord Chief Justice; and by divers subsequent Acts provision was made for further and other duties to be performed by such commissioners: And whereas the present Lord Chief Justice of England was before and down to the time of his appointment to that office Lord Chief Justice of the Common Pleas, and after his appointment to be Lord Chief Justice of England no other person was appointed to be Lord Chief Justice of the Common Pleas, and that office has since been abolished: Be it enacted and declared, that every appointment of any person to be a commissioner for taking such acknowledgments and performing such other duties as aforesaid, and every order for the removal of any person from such office of commissioner, which shall have been made by the present Lord Chief Justice of England at any time since his appointment to that office, or shall be hereafter made by the Lord Chief Justice of England for the time being, shall be and be deemed to have been valid and effectual in the law, to all intents and purposes whatsoever, in the same manner as if it had been made by a Lord Chief Justice of the Common Pleas before the abolition of that office.

Commissioners for acknowledgments by married women.

27. And whereas it is expedient that the jurisdiction of county courts should be exercised as far as conveniently may be in a manner similar to that of the High Court in the like cases, and doubts have arisen as to the extent of the powers of making rules and orders for regulating the practice of county courts contained in the Act of the nineteenth and twentieth years of Her present Majesty, chapter one hundred and eight, which doubts it is expedient to remove: Be it enacted that the power of making rules and orders for regulating the practice of county courts contained in section thirty-two of the said last-mentioned Act shall be deemed to extend to all matters of procedure or practice, or relating to or concerning the effect or operation in law of any procedure or practice, in any cases within the cognizance of county courts, as to which rules of court have been or might lawfully be made by or under the provisions of the Judicature Acts,

Sect. 27. Powers to make rules for practice of county courts.

Act 1881, s. 27.

1873 and 1875, and the Appellate Jurisdiction Act, 1876, for cases within the cognizance of Her Majesty's High Court of Justice; and any rules heretofore made under the provisions of the said first-mentioned Act, in the manner and with the concurrence thereby required, as to any such matters as aforesaid, shall be deemed to be and to have been to all intents and purposes valid and effectual in law.

See s. 91 of the Act of 1873, *ante*, p. 90, which applies the Rules of Law enacted by that Act to all courts in England.

FIRST SCHEDULE TO THE ACT OF 1875.

RULES OF COURT.*

[NOTE.—Where no other provision is made by the Act or these Rules the old procedure and practice remain in force, and when there was a variance between the practice of the Common Law and Chancery Courts, that practice which appears most convenient will now be adopted. †]

ORDER I.

Order I.

FORM AND COMMENCEMENT OF ACTION.

R. 1. Action.

1. All actions which have hitherto been commenced by writ in the Superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits which have hitherto been commenced by bill or information in the High Court of Chancery, or by a cause in rem or in personam in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action.

By s. 100 of the Act of 1873, "action" shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court; and shall not include a criminal proceeding by the Crown.

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* The original rules of this schedule, so far as they are still in force, derive their authority from s. 16 of the foregoing Act of 1875, *ante*, p. 108, and may be cited as "The Rules of the Supreme Court." The rules subsequently made, and which are embodied with them in their proper places, derive their authority from s. 17 of the same Act, *ante*, p. 109, and s. 17 of the Act of 1876, *ante*, p. 136. Such of the rules as have been repealed or annulled are printed in italic type.

† See s. 21 of the Act of 1875, *ante*, p. 139, and note thereto.

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The proceedings which, under this rule, are to be instituted by action are Common Law actions, suits in Chancery formerly commenced by bill or information, and Admiralty and Probate Suits. Proceedings in any of the Courts consolidated by the Act which have hitherto been instituted in any other mode, as, for instance, Chancery proceedings commenced by petition or originated by summons, are unaffected by this rule: though others of the rules may affect them; see, for instance, the rules of O. XIX. as to pleadings, *post*, p. 248, which, by s. 100 of the Act of 1873, *ante*, p. 92, includes petitions and summonses. By O. LXII., *post*, p. 443, subject to the exceptions contained in that order, nothing in the rules is to affect the practice or procedure in criminal proceedings, proceedings on the Crown side of the Queen's Bench, or the revenue side of the Exchequer Divisions, or proceedings for divorce or other matrimonial causes.

An action by the Attorney-General at the relation of a private individual should no longer be styled an information: *Att.-Gen.* v. *Shrewsbury Bridge Co.*, 42 L. T. 79.

Notice of action.

As to notice of action when required by statute see *Flower* v. *Local Board of Low Leyton*, 5 Ch. D. 347, C. A., where it was held that the provisions of s. 264 of the Public Health Act, 1875, which require a month's notice of action to be given to local boards of health, do not apply to actions where the principal relief sought is an injunction, and damages are only claimed as subsidiary thereto. In so far as notice of action is prescribed by acts prior to 1842 the length of notice to be given is regulated by 5 & 6 Vict. c. 97, s. 4, which fixes the period at one month.

R. 2. Interpleader.

2. With respect to interpleader, the procedure and practice now used by Courts of Common Law under the Interpleader Acts, 1 & 2 Will. 4, c. 58, and 23 & 24 Vict. c. 126, shall apply to all actions and all the divisions of the High Court of Justice, and the application by a defendant shall be made at any time after being served with a writ of summons and before delivering a defence.

This rule and the other provisions referred to below adopt the Common Law practice as to interpleader, but with some important modifications. The subject acquires increased importance by reason of s. 25, sub-s. 6, of the Act of 1873, *ante*, p. 27, which allows a debtor, or other person liable in respect of a chose in action alleged to have been assigned, to call upon rival claimants to interplead. It may be well, therefore, first to set out the Interpleader Acts referred to in the above rule, and then to consider what the practice under them, as modified by the new legislation, is.

The Acts are as follows:—

1 & 2 WILL. IV. C. 58.

Interpleader Act, 1 & 2 Will. 4, c. 58.

An Act to enable Courts of Law to give Relief against Adverse Claims made upon persons having no interest in the subject of such Claims. [20th Oct. 1831.]

pli- y a

S. 1. "WHEREAS it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and

which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in equity against the plaintiff and such third party, usually called a bill of interpleader, which is attended with expense and delay: for remedy thereof, be it enacted, &c., that upon application made by or on the behalf of any defendant sued in any of his Majesty's Courts of Law at Westminster, or in the Court of Common Pleas of the County Palatine of Lancaster, or the Court of Pleas of the County Palatine of Durham, in any action of assumpsit, debt, detinue, or trover, such application being made after declaration, and before plea, by affidavit or otherwise, showing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued, or is expected to sue, for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into Court, or to pay or dispose of the subject-matter of the action in such manner as the Court (or any judge thereof) may order or direct: it shall be lawful for the Court, or any judge thereof, to make rules and orders calling upon such third party to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim, and upon such rule or order to hear the allegations as well of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues,* and also to direct which of the parties shall be plaintiff or defendant on such trial, or with the consent of the plaintiff and such third party, their counsel or attorneys, to dispose of the merits of their claims, and determine the same in a summary manner, and to make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable."

defendant in an action of assumpsit, &c., stating that the right in the subject matter is in a third party, the Court may order such third party to appear, and maintain or relinquish his claim, and in the meantime stay proceeding in such action.

See note on 1 & 2 Vict. c. 45, s. 2, *post*, p. 179, and *Hamlyn* v. *Betteley*, 6 Q. B. D. 63, C. A.

S. 3. "And be it further enacted, that if such third party shall not appear upon such rule or order to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the Court or judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators; saving, nevertheless, the right or claim of such third party against the plaintiff; and thereupon to make such order between such defendant and the plaintiff, as to costs and other matters, as may appear just and reasonable."

If such third party shall not appear, &c., the Court may bar his claim against the original defendant.

S. 5. "Provided also, and be it further enacted, that if upon application to a judge, in the first instance, or in any later stage of the proceedings, he shall think the matter more fit for the decision of the Court, it shall be lawful for him to refer the matter to the Court, and thereupon the Court shall and may hear and dispose of the same in the same manner as if the proceedings had originally commenced by rule of court, instead of the order of a judge."

If a judge thinks the matter more fit for the decision of the Court he may refer it.

Where a case is referred under this section, no appeal lies from the decision of the court: *Turner* v. *Bridgett*, W.N. 1882, p. 70.

* By the 8 & 9 Vict. c. 109, s. 19, the use of feigned issues alleging imaginary wagers was abolished, and a form of issue provided. For the form in ordinary use, see Chitty's Forms, p. 825, ed. 10; Day, C. L. P. Acts, 357, n., ed. 4.

Order I. r. 2.

For relief of sheriffs and other officers in execution of process against goods and chattels.

S. 6. "And whereas difficulties sometimes arise in the execution of process against goods and chattels, issued by or under the authority of the said Courts, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons not being the parties against whom such process has issued, whereby sheriffs and other officers are exposed to the hazard and expense of actions; and it is reasonable to afford relief and protection in such cases to such sheriffs and other officers; be it therefore further enacted, that when any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any process, or to the proceeds or value thereof, it shall and may be lawful to and for the Court from which such process issued, upon application of such sheriff or other officer made before or after the return of such process, and as well before as after any action, brought against such sheriff or other officer, to call before them, by rule of court, as well the party issuing such process as the party making such claim, and thereupon to exercise for the adjustment of such claims and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case; and the costs of all such proceedings shall be in the discretion of the Court."

See note on 1 & 2 Vict. c. 45, s. 2, *infra*.

Rules, orders, &c., made in pursuance of this Act, may be entered of record and made evidence.

Costs.

Writs.

Sheriffs' fees.

S. 7. "And be it further enacted, that all rules, orders, matters, and decisions to be made and done in pursuance of this Act, except only the affidavits to be filed, may, together with the declaration in the cause (if any) be entered of record, with a note in the margin, expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by such rule or order, and every such rule or order so entered shall have the force and effect of a judgment, except only as to becoming a charge on any lands, tenements, or hereditaments; and in case any costs shall not be paid within fifteen days after notice of the taxation and amount thereof given to the party ordered to pay the same, his agent or attorney, execution may issue for the same by *fieri facias* or *capias ad satisfaciendum*, adapted to the case, together with the costs of such entry, and of the execution if by *fieri facias*; and such writ and writs may bear teste on the day of issuing the same, whether in term or vacation; and the sheriff or other officer executing any such writ shall be entitled to the same fees, and no more, as upon any similar writ grounded upon a judgment of the Court."

Interpleader in mandamus.

S. 8. "And whereas by a certain Act made, and past in the last session of Parliament, entitled 'An Act to improve the proceedings in prohibition and on writs of mandamus,' it was among other things enacted, that it should be lawful for the Court to which application may be made for any such writ of mandamus as is therein in that behalf mentioned, to make rules and orders calling not only upon the person to whom such writ may be required to issue, but also all and every other person having or claiming any right or interest in or to the matter of such writ to show cause against the issuing of such writ and payment of the costs of the application, and upon the appearance of such other person in compliance with such rules, or in default of appearance after service thereof, to exercise all such powers and authorities, and to make

all such rules and orders applicable to the case as were or might be given or mentioned by or in any Act passed or to be passed during that present session of Parliament, for giving relief against adverse claims made upon persons having no interest in the subject of such claims; and whereas no such Act was passed during the then present session of Parliament: be it therefore enacted, that upon any such application as is in the said Act, and hereinbefore mentioned, it shall be lawful for the Court to exercise all such powers and authorities, and make all such rules and orders applicable to the case, as are given or mentioned by or in this present Act."

The 1 & 2 Vict. c. 45, s. 2, enabled any judge to exercise the powers bestowed by the 1 & 2 Will. 4, c. 58, s. 6, on the several courts. But this enactment, having become unnecessary under the Judicature Acts (see s. 17 of the Act of 1876, *ante*, p. 136), was repealed by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59).

1 & 2 Vict. c. 45, s. 2.

23 & 24 Vict. c. 126.

23 & 24 Vict. c. 126.

Common Law Procedure Act 1860.

S. 12. "Where an action has been commenced in respect of a common law claim for the recovery of money or goods, or where goods or chattels have been taken or are intended to be taken in execution under process issued from any one of the Superior Courts, or from the Court of Common Pleas at Lancaster, or the Court of Pleas at Durham, and the defendant in such action, or the sheriff or other officer, has applied for relief under the provisions of an Act made and passed in the session of Parliament held in the first and second years of the reign of his late Majesty King William the Fourth, entitled 'An Act to enable the Courts of Law to give relief against adverse claims made upon persons having no interest in the subject of such claims,' it shall be lawful for the Court or judge to whom such application is made to exercise all the powers and authorities given to them by this Act and the hereinbefore mentioned Act passed in the session of Parliament held in the first and second years of the reign of his late Majesty King William the Fourth, though the titles of the claimants to the money, goods, or chattels in question, or to the proceeds or value thereof have not a common origin, but are adverse to and independent of one another."

Interpleader may be granted though titles have not a common origin.

1 & 2 Will. 4, c. 58.

See *Attenborough* v. *St. Katherine's Dock Co.*, 3 C. P. D. at 456, *per* Bramwell, L. J.

S. 13. "When goods or chattels have been seized in execution by a sheriff or other officer under process of the above-mentioned Courts, and some third person claims to be entitled, under a bill of sale or otherwise, to such goods or chattels by way of security for a debt, the Court or a judge may order a sale of the whole or part thereof upon such terms as to payment of the whole or part of the secured debt or otherwise as they or he shall think fit, and may direct the application of the proceeds of such sale in such manner and upon such terms as to such Court or judge may seem just."

Court or judge may direct sale of goods seized in execution.

S. 14. "Upon the hearing of any rule or order calling upon persons to appear and state the nature and particulars of their claims, it shall be lawful for the Court or judge wherever, from

Power to Court or judge to

Order L. r. 2.

decide summarily in certain cases.

the smallness of the amount in dispute, or of the value of the goods seized, it shall appear to them or him desirable and right so to do, at the request of either party to dispose of the merits of the respective claims of such parties, and to determine the same in a summary manner upon such terms as they or he shall think fit to impose, and to make such other rules and orders therein as to costs and all other matters as may be just."

Special case may be stated where facts undisputed.

S. 15. "In all cases of interpleader proceedings, where the question is one of law and the facts are not in dispute, the judge shall be at liberty, at his discretion, to decide the question without directing an action or issue, and, if he shall think it desirable, to order that a special case be stated for the opinion of the Court."

Proceedings on special case in Court below and in error.

S. 16. "The proceedings upon such case shall, as nearly as may be, be the same as upon a special case stated under the Common Law Procedure Act, 1852, and error may be brought upon a judgment upon such case; and the provisions of the Common Law Procedure Act, 1854, as to bringing error upon a special case, shall apply to the proceedings in error upon a special case under this Act."

But see now O. XXXIV. r. 7, and O. LVIII. r. 1.

Judgment and decision: when to be final.

S. 17. "The judgment in any such action or issue as may be directed by the Court or judge in any interpleader proceedings, and the decision of the Court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them."

See note on appeals, *post*, p. 182.

Rules, orders, &c. made in interpleader proceedings may be entered of record and made evidence.

S. 18. "All rules, orders, matters, and decisions to be made and done in interpleader proceedings under this Act (excepting only any affidavits), may, together with the declaration in the cause, if any, be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order so entered shall have the force and effect of a judgment in the Superior Courts of Common Law.

Practice in Interpleader.

Interpleader is of two kinds:—I. That for the protection of ordinary persons harassed by conflicting claims. II. That for the protection of sheriffs and other officers executing process.

I. Interpleader by ordinary persons:—

Right to relief.

Relief by interpleader when the same thing is claimed against the same person by several claimants was given by the Court of Chancery in the exercise of its traditional jurisdiction; and by the Common Law Courts, to a very limited extent at Common Law, but mainly under statutory authority. The jurisdiction, however, of the two classes of courts, and the conditions of its exercise, were not identical.

The Common Law and Equity Courts alike required—

That the party seeking protection should himself claim no interest in the subject-matter;

That he should be in possession of the subject-matter; so as to be able, as well as willing, to comply with the order of the Court with respect to it. Order I. r. 2.

Right to relief.

But, on the one hand, Courts of Equity refused this relief where the party seeking it was under any special liabilities, other than those arising from the title to the property, towards one of the claimants with respect to the subject-matter claimed. They always refused, therefore, to grant interpleader to an agent or bailee as against his principal or bailor where goods were claimed by another under an adverse independent title: *Crawshay* v. *Thornton*, 2 M. & C. 1; Story's Eq. Jur. § 820. Courts of Law were not so restricted: *Best* v. *Hayes*, 1 H. & C. 718; *Tanner* v. *European Bank*, L. R. 1 Ex. 261, and the common law now prevails in this respect. *Attenborough* v. *London and St. Katherine's Dock Co.*, 3 C. P. D. 453, C. A. As to stake-holders, see *Laing* v. *Zeden*, L. R. 9 Ch. 736. See also *Wright* v. *Freeman*, 48 L. J. C. P. 276.

On the other hand, the Common Law Courts, at least until lately, gave relief by interpleader only when both claims were legal, as distinguished from equitable; though of late the strictness of this rule was considerably relaxed; *Rusden* v. *Pope*, L. R. 3 Ex. 269; *Bank of Ireland* v. *Perry*, L. R. 7 Ex. 14; *Duncan* v. *Cashin*, L. R. 10 C. P. 554; *Engelbach* v. *Nixon*, *Ibid.* 645; *Schroeder* v. *Hanrott*, 28 L. T. 704.

Again, Courts of Law, under the Interpleader Acts, had only power to give relief after an action (and an action under the 1 & 2 Will. 4, c. 58, of assumpsit, debt, detinue, or trover, or under the C. L. P. Act, 1860, in respect of a common law claim for the recovery of money or goods,) had been commenced against the applicant by one of the claimants: Whereas in Chancery it was enough that conflicting claims had been made, though no legal proceedings had been actually commenced. O. L. r. 2, *ante* p. 176, which says that the application *by a defendant* may be made at the time specified, seems to contemplate that the relief may also have to be sought otherwise than by a defendant. And s. 25, sub-s. 6, of the Act of 1873, *ante*, p. 28, also appears to allow relief by interpleader, in cases falling within that section, after *notice* of conflicting claims, without waiting for an action to be brought. See *Re New Hamburgh Ry. Co.*, W. N. 1875, p. 239, Quain, J.; *Lacey* v. *Wieland*, W. N. 1876, p. 24, Lindley, J., at Chambers. And, generally, it may probably be presumed that wherever heretofore one Court had power to give relief under circumstances in which the other could not do so, the more liberal rule will for the future prevail in all divisions of the Court. See ss. 16, 24, of the Act of 1873, *ante*, p. 12.

Practice.

By O. L. r. 2, the common law practice in interpleader is to prevail, except of course so far as the rule itself, or any other provision in the new legislation, modifies it.

Heretofore, under the Interpleader Acts, the application by a *defendant* could only be made after declaration and before plea. Under r. 2, it may be made after service of the writ and before defence.

The application is made at chambers by summons calling upon the claimant to appear and state his claim. It is made to a master, except where the parties consent that the matter shall be finally determined at chambers, or when the sum is less than £50 and one of the parties desires that the matter shall be so determined. In these cases, except by consent, the question must be

Order I. r. 2.

determined by a judge, see O. LIV. r. 2a, *post*, p. 401. It seems doubtful whether this new rule conferring jurisdiction on masters extends to district registrars.

Practice in interpleader.

For forms of orders in the Chancery Division, see Seton on Decrees, p. 358, ed. 4; and for general forms see Forms H. Nos. 48—54, *post*, p. 599, *et seq.*

The application is founded on affidavit, showing (1 & 2 Will. 4, c. 58, s. 1, *ante*, p. 124) that the applicant does not claim any interest in the subject-matter, but that the right is claimed or supposed to belong to a third party who has sued or is expected to sue; and that the applicant does not collude with such third party, but is ready to bring into Court, or to pay or dispose of, the subject-matter of the action, as may be ordered. See Form B. No. 27, *post*, p. 486.

If the party summoned does not appear to maintain his claim, an order may be made barring it (1 & 2 Will. 4, c. 58, s. 3, *ante*, p. 177).

If the party summoned does appear to maintain his claim, several courses are open—

If from the smallness of the amount in dispute or the value of the goods seized it appears desirable, the judge may, on the application of either party, dispose of the matter summarily (C. L. P. Act, 1860, s. 14, *ante*, p. 179):

If the question is one of law, and the facts are not in dispute, the judge may in his discretion decide the question summarily (C. L. P. Act, 1860, s. 15, *ante*, p. 180):

If, as in the last case, the question is one of law, the judge may order a special case to be stated for the opinion of the Court (*Ibid.*):

The judge may order the claimant to make himself defendant in the original action pending against the party seeking relief by interpleader, or in some other action; or may order an issue to be tried, and may direct who shall be plaintiff and who defendant in such issue (1 & 2 Will. 4, c. 58, s. 1, *ante*, p. 176).

As to when particulars will be ordered, see *Price* v. *Plummer*, 25 W. R. 45.

As to making costs a charge upon the fund, see *Attenborough* v. *St. Katherine's Dock Co.*, 3 C. P. D. at 466, C. A. The costs in interpleader are in the discretion of the Court under O. LV.: *Hartmont* v. *Foster*, 8 Q. B. D. 82, C. A. An interpleader issue cannot be tried by a judge without a jury, and the provisions of O. XXXVI. r. 3, do not apply to interpleader: *Hamlyn* v. *Betteley*, 6 Q. B. D. 63, C. A.

O. XVI. r. 17, seems to provide an alternative procedure, but it in no way supersedes the remedy by way of interpleader, which has the advantage of finality: see *Attenborough* v. *St. Katherine's Dock Co.*, 3 C. P. D. at 456, C. A.

Appeal

In *Dodds* v. *Shepherd*, 1 Ex. D. 75, it was held, that where a judge at chambers decides summarily on an interpleader summons, no appeal lies to a Divisional Court. See too *Turner* v. *Bridgett*, W. N., 1882, p. 70, C. A. But an appeal lies to the Court of Appeal from the order to enter judgment on an interpleader issue which has been tried in the ordinary way: *Witt* v. *Parker*, 46 L. J. Q. B. 450, C. A. The appeal must be brought within 21 days as from an interlocutory judgment: *McAndrew* v. *Barker*, 7 Ch. D. 701, C. A.

Sheriffs.

II. Interpleader by sheriffs:

The second kind of interpleader in use is that for the protection

of sheriffs and other officers executing process. It is governed by the statutes above set out, and the procedure is the same as in other cases. In r. 2, now under comment, it will be observed that the provision that the application shall be made after service of a writ is only in the case of a defendant. A sheriff has never had to wait till an action was brought against him. Order I. rr. 2, 3.

As to interpleader under the old practice in the Admiralty Court, see 24 & 25 Vict. c. 10, s. 16.

For forms, see *post*, p. 600, Forms H., Nos. 50—55.

As to ruling a sheriff to return a writ of *fi. fa.* pending an interpleader issue, see *Angell* v. *Baddeley*, 3 Ex. D. 49, C. A. As to the effect of the term "no action" when the sheriff is ordered to withdraw, see *Hooke* v. *Ind, Coope & Co.*, 36 L. T. 467.

3. All other proceedings in and applications to the High Court may, subject to these Rules, be taken and made in the same manner as they would have been taken and made in any Court in which any proceeding or application of the like kind could have been taken or made if the [1]Act had not been passed. R. 3. Other proceedings.

[1] *Sic.*

Accordingly, proceedings relating to arbitrations, under 9 & 10 Will. 3, c. 15, are not affected by these Rules: *Re Phillips and Gill*, 1 Q. B. D. 78. As to terms, when used as a measure of time for proceedings, see s. 26 of the Act of 1873, *ante*, p. 36, and note thereto. As to appearance under protest in Admiralty actions, see *The Vivar*, 2 P. D. 29, C. A. As to petitions under the Trustees Act, 1850, see *Re Gardener's Trusts*, 10 Ch. D. 29.

See further s. 21 of the Act of 1875, *ante*, p. 139, which expressly saves existing procedure where not inconsistent with the Act or Rules. Where there was a variance between the Common Law and Equity practice, and the new rules are silent on the point, the practice which appears most convenient will now be adopted: see note to s. 21, *ante*, p. 139.

ORDER II. Order II.

Writ of Summons and Procedure, &c.

1. Every action in the High Court shall be commenced by a writ of summons, which shall be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and which shall specify the Division of the High Court to which it is intended that the action should be assigned. R. 1. Writ

As to the indorsement of claim, see O. III., *post*, p. 186.

The words of this rule are general, requiring the indorsement to state *the nature of the claim, or of the relief or remedy required*. It seems then in terms to include the case in which a mandamus or an injunction, or the appointment of a receiver, is to be sought. On the other hand, by s. 25, sub-s. 8, of the Act of 1873, *ante*, p. 29, the Court is empowered to grant any of these things "by an interlocutory order. . . . in all cases in which it shall . . . . appear just or convenient." And by O. LII. r. 4, *post*, p. 396, the application may be made either *ex parte* or with notice. It would appear, therefore, that if the claim for a mandamus or an injunc-

Order II. rr. 1—3.

tion, or the appointment of a receiver, be a substantive part of what the plaintiff brings his action to obtain, he ought to indorse his writ accordingly: see forms in Appendix A, *post*, p. 469, Nos. 74, 75; but that the Court has full discretion to give such relief, if the necessity for it arises incidentally in the course of the action, see *Colebourne* v. *Colebourne*, 1 Ch. D. 690, V.-C. H. By O. III. r. 2, *post*, p. 187, a defective indorsement may be amended.

By ss. 33 and 42 of the Act of 1873, *ante*, pp. 46, 54, the writ of summons in an action commenced in the Chancery Division must also, as hitherto, be marked with the name of some particular judge of that division to whom the plaintiff chooses to assign the action.

As to notice to the proper officer of the choice of division, see s. 11 of the Act of 1875, *ante*, p. 104; and O. V. r. 9, *post*, p. 195.

By O. V. rr. 2 and 3, *post*, p. 193, where the writ is issued in a District Registry, then, if the defendant neither resides nor carries on business within the district, there must be a statement on the face of the writ that he may appear either in London or in the District Registry; and if he resides or carries on business within the district, a statement that he is to appear there.

As to notice of action when required by statute, see note to O. I. r. 1, *ante*, p. 176. As to fractions of a day, and the time from which a writ takes effect, see *Clarke* v. *Bradlaugh*, 8 Q. B. D. 63, C. A.

R. 2. Form of writ.

2. Any costs occasioned by the use of any more prolix or other forms of writs, and of indorsements thereon, than the forms hereinafter prescribed, shall be borne by the party using the same, unless the Court shall otherwise direct.

For forms of writs and indorsements, see Appendix A, *post*, p. 466.

The question of undue prolixity will be inquired into by the taxing officer: R. S. C. (Costs), *post*, p. 628, r. 18.

R. 3. Form of writ.

3. The writ of summons for the commencement of an action shall, except in the cases in which any different form is hereinafter provided, be in Form No. 1 in Part I. of Appendix (A) hereto, with such variations as circumstances may require.

For this form, see *post*, p. 447. No. 1. But this form has now become slightly inaccurate by reason of the creation of the Central Office and of the new rules as to appearances thereat; see Form 1a, *post*, p. 449, issued with the Rules of April, 1880, which is now the correct model.

Ejectment.

Formerly, in actions for the recovery of the possession of land a special form of writ of ejectment, prescribed by s. 169 of the C. L. P. Act, 1852, was in use. That Act abolished the old and cumbrous method of proceeding by ejectment, and provided a simpler procedure in its place. But it left the proceedings in ejectment materially different in many respects from those in ordinary actions. The writ was different: it gave sixteen days to appear, instead of, as in other actions, eight. There were no pleadings, but the defendant who appeared went to trial to try the plaintiff's right to recover the premises described in the writ. For the future, an action for the recovery of land will, with a few

exceptions, proceed in like manner to any other action. The writ will be the same: the indorsement only, as in other actions, showing the nature of the claim. There will be pleadings as in other actions. The most material differences will be, that the right of a landlord to intervene and defend is preserved (O. XII. r, 18, *post*, p. 214), and that a defendant in possession need not in general plead his title (O. XIX. r. 15, and note thereto, *post*, p. 257).

R. 3a. Form of writ. (R. S. C. June, 1876, r. 2.)

3a. Forms 2 and 3 in Part I. of Appendix (A) to "The Rules of the Supreme Court" shall be read as if the words "by leave of the Court or a judge" were not therein.

For these forms, see *post*, p. 452, Nos. 2 and 3. See also the new forms 2a, 2b, provided by the Rules of April, 1880.

The object of this rule is to correct a mistake, which might well mislead a defendant, in the forms originally given of writs for service, or of which notice is to be given, out of the jurisdiction. The form conveyed the notion that judgment by default could only be obtained by leave of the Court or a judge: no such leave being in fact necessary. See forms, *post*, p. 452; *Scott* v. *Royal Wax Candle Co.*, 1 Q. B. D. 404; *Bacon* v. *Turner*, 3 Ch. D. 275, V.-C. H.

R. 4. Writ for service abroad.

4. No writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of a Court or judge.

See O. XI., *post*, p. 206, and note thereto, where the subject is fully considered. See *Stigand* v. *Stigand*, 19 Ch. D. 460, as to the practice in the Chancery Division. When the defendant is not a British subject, and is not in British dominions, notice must be given in lieu of service of writ: see forms, *post*, p. 452.

R. 5. Form of writ for service abroad.

5. A writ of summons to be served out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be in Form No. 2 in Part I. of Appendix (A) hereto, with such variations as circumstances may require. Such notice shall be in Form No. 3 in the same Part, with such variations as circumstances may require.

For the forms here referred to, see *post*, p. 452, Nos. 2 and 3; and see r. 3a, *supra*, which corrects an error in them: and see Nos. 2a, 2b, 3a, 3b, provided by the Rules of April, 1880, which contain a foot-note stating when notice is to be given in lieu of service of the writ, *i.e.*, when the defendant is not a British subject.

R. 6. Bills of Exchange Act.

6. *With respect to actions upon a bill of exchange or promissory note, commenced within six months after the same shall have become due and payable, the procedure under the Bills of Exchange Act*, 18 & 19 *Vict. c.* 67, *shall continue to be used.*

Order II. rr. 6a—8.

R. 6a. Special procedure under Bills of Exchange Act abolished. (R. S. C., 1880, r. 3.)

6a. Order II., Rule 6, is hereby annulled, and no writ shall hereafter be issued under the Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67).

Before this rule was passed, when a plaintiff desired to take summary proceedings to enforce a bill, note, or cheque he could proceed either under the 18 & 19 Vict. c. 67, or under O. XIV. There were some inconveniences in working the Bills of Exchange Act in with the procedure under the Judicature Acts, and it was therefore thought desirable to abolish the alternative procedure under the Bills of Exchange Act.

See *Smith* v. *Wilson*, 5 C. P. D. 25, C. A., for an instance of the application of O. XIV. to bills of exchange.

R. 7. *Writ in Admiralty action.*

7. The writ of summons in every Admiralty action in rem shall be in Form No. 4 of Part I. of Appendix (A) hereto, with such variations as circumstances may require.

R. 7a. Writ in Admiralty action (R. S. C. Dec. 1875, r. 2.)

7a. Form A in the Appendix to these Rules shall be substituted for the form referred to in Order II., Rule 7, of "The Rules of the Supreme Court."

See the substitute form, *post*, p. 458. No. 4a.

The original form combined the writ of summons and the warrant of arrest in one document. The new form is a writ of summons only. As to the issue of the warrant of arrest, see O. V. r. 11a, *post*, p. 196. As to service of each document, see O. IX. rr. 9a and 10a, *post*, p. 205.

R. 8. Date and teste of writ.

8. Every writ of summons and also every other writ shall bear date on the day on which the same shall be issued, and shall be tested in the name of the Lord Chancellor, or if the office of Lord Chancellor shall be vacant, in the name of the Lord Chief Justice of England.

See O. LXII., *post*, p. 442, which excepts from the operation of the Rules criminal proceedings, revenue proceedings, proceedings on the Crown side of the Queen's Bench Division, and divorce proceedings.

Order III.

ORDER III.

Indorsements of Claim.

R. 1. Common indorsement.

1. The indorsement of claim shall be made on every writ of summons before it is issued.

Four different kinds of indorsement are dealt with in this order:

1. The "statement of the nature of the claim made, or of the

relief or remedy required," prescribed by O. II. r. 1, *ante*, p. 183, and dealt with in the first five rules of this order; Order III. rr. 1—4.

2. The indorsement of the amount of debt and costs required, when the claim is for a debt, by r. 7 of this order: following s. 8 of the C. L. P. Act, 1852;
3. The special indorsement authorized by r. 6 of this order, as heretofore by s. 25 of the C. L. P. Act, 1852, to warrant proceedings in case of default of appearance under O. XIII. rr. 3 and 4, *post*, pp. 216, 217, or notwithstanding appearance, under O. XIV., *post*, p. 222.
4. The indorsement of a claim for an account under r. 8. of this order, to warrant proceedings under O. XV., *post*, p. 225.

R. 2. Essentials of indorsement. Amendment

2. In the indorsement required by Order II., Rule 1, it shall not be essential to set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled. The plaintiff may by leave of the Court or judge amend such indorsement so as to extend it to any other cause of action or any additional remedy or relief.

The object of this indorsement seems to be to identify the controversy and the claim to which the action relates, so as, amongst other advantages, to facilitate a settlement without the action going farther. In certain cases, as where the defendant fails to appear, the indorsement will take the place of pleadings, and damages may be assessed upon it: O. XIII. r. 6, *post*, p. 218. But if the action proceeds and pleadings are delivered, the plaintiff in his claim must state both his complaint and the relief he seeks. He cannot rely upon his indorsement for either: O. XIX. r. 2, *post*, p. 248.

After a statement of claim has been delivered, any amendment of the indorsement on the writ seems unnecessary, as the statement of claim, rather than the writ, is to be looked at. See *Large* v. *Large*, W. N. 1877, p. 198; *Johnson* v. *Palmer*, 4 C. P. D. at 262, *per* Lord Coleridge.

R. 3. Form of indorsement.

3. The indorsement of claim may be to the effect of such of the Forms in Part II. of Appendix (A) hereto as shall be applicable to the case, or if none be found applicable, then such other similarly concise form as the nature of the case may require.

For the forms here referred to, see *post*, pp. 462 to 473.

R. 4. Representative capacity.

4. If the plaintiff sues or the defendant or any of the defendants is sued in a representative capacity, the indorsement shall show, in manner appearing by the statement in Appendix (A) hereto, Part II., Sec. VIII., or by any other statement to the like effect, in what capacity the plaintiff or defendant sues or is sued.

For the forms here referred to, see *post*, pp. 473 *et seq.*

In an ordinary creditor's action for administration of the real

Order III. rr. 4—7.

and personal estate of a deceased debtor, the action must be by the plaintiff on behalf of himself and all the other creditors; and the writ must be indorsed accordingly: *Worraker* v. *Pryer*, 2 Ch. D. 109; *Re Royle*, 5 Ch. D. 540; *Re Vincent*, 26 W. R. 94. As to the right of a plaintiff to sue on behalf of himself and others having the same interest, see O. XVI. r. 9, *post*, p. 231.

R. 5. In Probate actions.

5. In Probate actions the indorsement shall show whether the plaintiff claims as creditor, executor, administrator, residuary legatee, legatee, next of kin, heir-at-law, devisee, or in any and what other character.

R. 6. Special indorsement.

6. In all actions where the plaintiff seeks merely to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising upon a contract, express or implied, as, for instance, on a bill of exchange, promissory note, cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt, or on a guaranty, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or note, or on a trust, the writ of summons may be specially indorsed with the particulars of the amount sought to be recovered, after giving credit for any payment or set-off.

The use of this indorsement is, as it always has been, purely optional. But the advantage of using it is very great; for it will not only, as formerly, entitle the plaintiff to final judgment in case of default of appearance: O. XIII. rr. 3 & 4, *post*, pp. 216, 217; but also to final judgment notwithstanding appearance, unless the defendant can satisfy a judge that he has a defence, or ought to be allowed to defend: O. XIV., *post*, p. 222.

By O. XXI. r. 4, *post*, p. 266, where the defendant does not dispense with a statement of claim, the plaintiff may deliver as his statement of claim a notice that his claim is that which appears by the indorsement on the writ.

As to the sufficiency of the indorsement, see *Walker* v. *Hicks*, 3 Q. B. D. 8; *Parpaite Frères* v. *Dickenson*, 26 W. R. 479; *Smith* v. *Wilson*, 5 C. P. D. 25, C. A. Any indorsement which would have been sufficient under s. 25 of the C. L. P. Act, 1852, is sufficient under this rule: *Aston* v. *Harwitz*, 41 L. T. 521, C. A.; *Yeatman* v. *Snow*, 28 W. R. 574; *Godden* v. *Corsten*, 5 C. P. D. 17.

The rule corresponds to s. 25 of the C. L. P. Act, 1852, but it differs in two points. First, the rule includes the case of a liquidated sum payable on a trust, which a former section did not. Secondly, there are no words in the rule, as there were in the section, limiting its operation to cases in which the defendant resides within the jurisdiction.

See forms, *post*, pp. 472 to 474.

R. 7.

7. Wherever the plaintiff's claim is for a debt or liqui-

dated demand only, the indorsement, beside stating the nature of the claim, shall state the amount claimed for debt, or in respect of such demand, and for costs respectively, and shall further state, that upon payment thereof within four days after service, or in case of a writ not for service within the jurisdiction within the time allowed for appearance, further proceedings will be stayed. Such statement may be in the form in Appendix (A) hereto, Part II., Sec. III. The defendant may, notwithstanding such payment, have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's solicitor shall pay the costs of taxation.

Order III, rr. 7, 8.

Indorsement of sum on payment of which action stayed.

See forms, *post*, pp. 465 to 473.

The use of this indorsement, it will be observed, is obligatory.

This rule is to the same effect as s. 8 of the C. L. P. Act, 1852. The only effect of such indorsement is to entitle the defendant to settle the claim by payment within four days; the plaintiff is not bound by it for any other purpose: *Jacquot* v. *Bourn*, 5 M. & W. 155, 156.

When the defendant wishes to take advantage of this rule, but the sum claimed for costs is excessive, he has two courses open to him. (1) He may pay the amount claimed, have the costs taxed, and then get back the excess; or, (2) he may take out a summons to have the action stayed on payment of the amount claimed, and a less sum for costs. The sums now allowed for costs are somewhat more liberal than those allowed under R. G. H. T. 1853, r. 1; but there is no rule of court defining them.

If the plaintiff accept payment after the four days have expired the defendant is entitled to have costs taxed in accordance with this rule: *Hoole* v. *Earnshaw*, 39 L. T. 410, C. A.

8. In all cases of ordinary account, as, for instance, in the case of a partnership or executorship or ordinary trust account, where the plaintiff, in the first instance, desires to have an account taken, the writ of summons shall be indorsed with a claim that such account be taken.

R. 8.

Indorsement of claim for account.

For proceedings when a writ is thus indorsed, see O. XV., *post*, p. 225.

The use of this indorsement is optional; but as, under O. XV., it will ordinarily entitle the plaintiff to an order for an account as of course, and so give him often all that he could hitherto have obtained by a Chancery suit, the advantages of its use are obvious.

ORDER IV.

Order IV.

Indorsement of Address.

1. The solicitor of a plaintiff suing by a solicitor shall indorse upon every writ of summons and notice in lieu of

R. 1.

Address of

Order IV. rr. 1—3.

Solicitor and of plaintiff.

service of a writ of summons the address of the plaintiff, and also his own name or firm and place of business, and also, if his place of business shall be more than three miles from Temple Bar, another proper place, to be called his address for service, which shall not be more than three miles from Temple Bar, where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him. And where any such solicitor is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor.

Under the C. L. P. Act, 1852, s. 6, the attorney issuing the writ, or the plaintiff if he did so in person, was obliged to indorse his name and residence. But the provision in these rules as to an address for service indorsed on the writ is new.

It was not necessary to indorse the address of the plaintiff in a case where an attorney was employed, on a Common Law writ; but in a bill in Chancery the plaintiff's address was required to be stated in the body of the bill.

As to the defendant's address for service, see O. XII. r. 8, *post*, p. 213.

R. 2. Address of plaintiff in person.

2. A plaintiff suing in person shall indorse upon every writ of summons and notice in lieu of service of a writ of summons his place of residence and occupation, and also, if his place of residence shall be more than three miles from Temple Bar, another proper place, to be called his address for service, which shall not be more than three miles from Temple Bar, where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him.

[The above two Rules are to apply to all cases in which the writ of summons is issued out of the London office, or out of a District Registry where the defendant has the option of entering an appearance either in the District Registry or the London office.]

R. 2a. Writ issued in London. (R. S. C. Feb. 1876, r. 2.)

2a. Notwithstanding anything to the contrary contained in Order IV. of "The Rules of the Supreme Court," Rules 1 and 2 of such Order shall only apply where the writ of summons is issued out of the London office.

R. 3. ...ess ...writ ...l in

3. *In all other cases where a writ of summons is issued out of a District Registry it shall be sufficient for the solicitor to give on the writ the address of the plaintiff and*

his own name or firm and his place of business within the district, or for the plaintiff if he sues in person to give on the writ his place of residence and occupation, and if his place of residence be not within the district, an address for service within the district.

Order IV. rr. 3—3a. District Registry.

3a. Order IV., Rule 3, is hereby annulled, and the following shall stand in lieu thereof:

R. 3a. Address when writ issued in District Registry. (R. S. C., Feb. 1876, r. 3.)

In all cases where a writ of summons is issued out of a District Registry the solicitor shall give on the writ the address of the plaintiff, and his own name or firm and his place of business, which shall, if his place of business be within the district of the registry, be an address for service, and if such place be not within the district, he shall add an address for service within the district, and where the defendant does not reside within the district he shall add a further address for service, which shall not be more than three miles from Temple Bar; and where the solicitor issuing the writ is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor. Where the plaintiff sues in person, he shall give on the writ his place of residence and occupation, which shall, if his place of residence be within the district, be an address for service, and if such place be not within the district, he shall add an address for service within the district, and where the defendant does not reside within the district, he shall add a further address for service, which shall not be more than three miles from Temple Bar.

As to what is a sufficient address for service, see *Smith* v. *Dobbin*, 3 Ex. D. 338, C. A. In that case the indorsement stated that the writ was "issued by Thomas Garrald of Hereford, whose address for service is Thomas Garrald, at Thomas White and Sons, London." This was held sufficient.

ORDER V.

Order V.

Issue of Writs of Summons.

1. *Place of Issue.*

R. 1. Option as to place of issue.

1. In any action other than a Probate action, the plaintiff, wherever resident, may issue a writ of summons out of the registry of any district.

Order V. r. 1a.

1a. Every writ of summons not issued out of a district registry shall be issued out of the Central Office.

R. 1a.

Issue of writs of summons out of Central Office.

Under the new rule all writs issued in London are issued out of a single department of the Central Office, namely, The Writ Appearance and Judgment Department, as to which see O. LX.A. r. 7. Formerly they issued out of different offices according to the division in which the actions were commenced.

(R. S. C. April, 1880, r. 4.)

It may be convenient here to state shortly the effect of the rules in this schedule with respect to the place in which proceedings are to be carried on, and the jurisdiction of district registrars:

Place where proceedings are to be taken.

Any writ of summons, except in a Probate action, may be issued, in the discretion of the plaintiff, either in the office in London, or in any District Registry.

If the writ is issued in London, the appearances will be entered in the Central Office: O. XII. r. 1, *post*, p. 210.

If the writ is issued in a District Registry, any defendant residing or carrying on business within the district must appear there (O. XII. r. 2, *post*, p. 211): the district being, by s. 60 of the Act of 1873, *ante*, p. 65, to be fixed by Order in Council. See the Order, *post*, p. 687. Any defendant not residing or carrying on business within the district may appear either in the District Registry or in London (O. XII. r. 3, *post*, p. 211).

If the defendant or all the defendants appear in the District Registry, the action will proceed there (O. XII. r. 4, *post*, p. 211).

If the defendant or any of the defendants appear in London, the action will proceed there (O. XII. r. 5, *post*, p. 211).

Although the action proceeds in London, the Court or a judge may still order any books or documents to be produced or accounts to be taken or inquiries made in any District Registry (s. 66 of the Act of 1873, *ante*, p. 68). And in this case, as well as when the action proceeds in a District Registry, the trial may be anywhere (O. XXXVI. rr. 1, *et seq.*, *post*, p. 317).

When the action proceeds in the District Registry, the proceedings are in general to be taken there:

i. If final judgment can be entered or an order for an account had by default, down to such judgment or order (O. XXXV. r. 1a, *post*, p. 317).

ii. If an interlocutory judgment can be entered for default, either of appearance or pleading, both it and, after damages are assessed, final judgment may be entered in the District Registry (*Ibid.*).

iii. Judgment after trial is to be entered in the registry unless otherwise ordered (*Ibid.*).

Causes in the Queen's Bench, Common Pleas, and Exchequer Divisions, are entered for trial with the associates; not with the registrar (*Ibid.*).

As to the jurisdiction of the registrar while an action is proceeding in a District Registry, see O. XXXV. rr. 3, 3a, 4, and notes thereto, *post*, p. 313.

An appeal lies to a judge from a district registrar, as from a master (O. XXXV. r. 7, *post*, p. 314). Execution may issue and costs be taxed in the registry (O. XXXV. r. 3, *post*, p. 313).

When an action proceeds in a District Registry, all documents required to be filed are to be filed in the registry (O. XIX. r. 29, *post*, p. 261).

If the action would, under the rules before stated, proceed in the District Registry, it may be removed by any defendant as of right upon notice, at any time before delivering his defence: except

that if the writ be specially indorsed he must either have obtained leave to defend under O. XIV., *post*, p. 222, or four days after appearance must have elapsed without the plaintiff applying for final judgment under that order. And the action may, by leave of the Court or a judge, be removed on the application of any party (s. 65 of the Act of 1873, *ante*, p. 67). And, conversely, if the action is proceeding in London, a judge may remove it to a District Registry (O. XXXV. rr. 11 to 13, *post*, pp. 314, 315).

See also note to O. XXXV., *post*, p. 308.

Order V. rr. 1a—4.

R. 2. Where defendant not within district of registry.

2. In all cases where a defendant neither resides nor carries on business within the district out of the registry whereof a writ of summons is issued, there shall be a statement on the face of the writ of summons that such defendant may cause an appearance to be entered at his option either at the District Registry or the London office, or a statement to the like effect.

See forms Nos. 1b, 2b, *post*, pp. 450, 451.

R. 3. Where defendant is within such district.

3. In all cases where a defendant resides or carries on business within the district, and a writ of summons is issued out of the District Registry, there shall be a statement on the face of the writ of summons that the defendant do cause an appearance to be entered at the District Registry, or to the like effect.

See forms Nos. 1b, 2b, *post*, pp. 450, 451.

2. *Option to choose Division in certain Cases.*

R. 4. Choice of division.

4. Subject to the power of transfer, every person by whom any cause or matter may be commenced in the High Court of Justice which would have been within the non-exclusive cognizance of the High Court of Admiralty, if the said Act had not passed, shall assign such cause or matter to any one of the divisions of the said High Court, including the Probate, Divorce, and Admiralty Division, as he may think fit, by marking the document by which the same is commenced with the name of the division, and giving notice thereof to the proper officer of the Court. If so marked for the Chancery Division the same shall be assigned to one of the judges of such division by marking the same with the name of such of the said judges as the plaintiff or petitioner (subject to such power of transfer) may think fit.

Section 34 of the Act of 1873, *ante*, p. 47, assigned certain classes of causes (subject to Rules of Court) to the various Divisions of the High Court of Justice: those assigned to the Probate, Divorce, and Admiralty Division being, in addition to pending matters, all causes and matters hitherto within the *exclusive* cognizance of the

Order V. rr. 4—5.

Probate, Divorce, or Admiralty Courts. Section 35, *ante*, p. 49 (subject to Rules of Court and the provisions of the previous section), empowered a plaintiff to lay his action in any division, not being the Probate, Divorce, and Admiralty Division. The result of those sections, if uncontrolled by rule, would have been to deprive suitors of the power of taking into the Court of Admiralty any cause in which that Court had hitherto had concurrent jurisdiction with any other Court. Hence the necessity for the above rule. But the rule appears now to be rendered superfluous by s. 11 of the Act of 1875, *ante*, p. 104, which is substituted for s. 35 of the earlier Act.

As to marking the writ with the name of the division to which the action is assigned, see s. 11 of the Act of 1875, *ante*, p. 104, and O. II. r. 1, *ante*, p. 183. As to notice to the proper officer, see *ibid.*, and r. 9, *post*, p. 195.

As to marking with the name of a judge in the Chancery Division, see the next rule, and ss. 33 and 42 of the Act of 1873, *ante*, pp. 46, 53.

As to transfers, see O. LI., *post*, p. 388, and note thereto.

R. 4a. Assigning to judge of Chancery Division. (R. S. C., June, 1877.)

4a. Subject to the power of transfer, and subject also to the power of the Lord Chancellor by order from time to time otherwise to direct, every cause or matter which shall be commenced in the Chancery Division of the High Court shall be assigned to one of the judges thereof by marking the same with the name of such of the same judges as the plaintiff or petitioner may in his option think fit.

R. 4b. Transferred actions. (R. S. C., March, 1879, r. 3.)

If, in any action commenced and pending in any one of the Queen's Bench, Common Pleas, or Exchequer Divisions of the High Court, the trial shall take place before a judge of another of the said divisions, the cause shall from that time be transferred to the division of which such judge is a member.

As to the merger of the Common Pleas and Exchequer Divisions in the Queen's Bench Division, see Order in Council of 16th December, 1880, *ante*, p. 42.

In *Jones* v. *Baxter*, 5 Ex. D. 275, C. A., it was held that when an action commenced in the Chancery Division is tried by a judge of the Exchequer Division with a jury, it thenceforth belongs to the Exchequer Division, and application for a new trial must be made in that division; but this principle does not apply when merely an issue is directed to be tried by a judge and jury while the action remains in the Chancery Division: *Jenkins* v. *Morris*, 14 Ch. D. 674, C. A.

3. *Generally.*

R. 5. Preparation of writ.

5. Writs of summons shall be prepared by the plaintiff or his solicitor and shall be written or printed, or partly

written and partly printed, on paper of the same description as hereby directed in the case of proceedings directed to be printed. Order V. rr. 5—10.

As to the printing and paper, see O. LVI., r. 2, *post*, p. 411.

6. Every writ of summons shall be sealed by the proper officer, and shall thereupon be deemed to be issued. R. 6. Sealing an issue of writ.

See O. LX.A, r. 1, *post*, p. 390, which creates a Writ, Appearance and Judgment Department in the Central Office.

7. The plaintiff or his solicitor shall, on presenting any writ of summons for sealing, leave with the officer a copy, written or printed, or partly written and partly printed, on paper of the description aforesaid, of such writ, and all the indorsements thereon, and such copy shall be signed by or for the solicitor leaving the same, or by the plaintiff himself if he sues in person. R. 7. Copy to file.

8. The officer receiving such copy shall file the same, and an entry of the filing thereof shall be made in a book to be called the cause book, which is to be kept in the manner in which cause books have heretofore been kept by the clerks of records and writs in the Court of Chancery, and the action shall be distinguished by the date of the year, a letter, and a number, in the manner in which causes are now distinguished in such last-mentioned cause books. R. 8. Filing. Entry in cause book.

And when such action shall be commenced in a District Registry, it shall be further distinguished by the name of such registry. (R. S. C., June, 1876, r. 3.)

9. Notice to the proper officer of the assignment of an action to any division of the Court under section 11 of the Supreme Court of Judicature Act, 1875, or under Rule 4 of this Order, shall be sufficiently given by leaving with him the copy of the writ of summons. R. 9. Notice of assignment of action.

By s. 11 of the Act of 1875, *ante*, p. 104, which is in substitution for s. 35 of the principal Act, the plaintiff electing his division must mark the document by which the action is commenced (that is, the writ) with the name of the division chosen, and give notice to the proper officer.

4. *In Particular Actions.*

10. The issue of a writ of summons in Probate actions shall be preceded by the filing of an affidavit made by R. 10. Probate actions.

Order V. rr. 10–11a.

the plaintiff or one of the plaintiffs in verification of the indorsement on the writ.

R. 11. *Admiralty actions.*

11. *In Admiralty actions in rem no writ of summons shall issue until an affidavit by the plaintiff or his agent has been filed, and the following provisions complied with:*

R. 11a. Admiralty actions. (R. S. C., Feb. 1875, r. 4.)

11a. Rule 3 of "The Rules of the Supreme Court, December, 1875," is hereby annulled, and the following rule substituted:

The first paragraph of Rule 11 of Order V. of "The Rules of the Supreme Court" is hereby annulled, and the following shall stand in lieu thereof:

In Admiralty actions in rem a warrant for the arrest of property according to the Form A in the Appendix to these rules may be issued at the instance either of the plaintiff or of the defendant at any time after the writ of summons has issued, but no warrant of arrest shall be issued until an affidavit by the party or his agent has been filed, and the following provisions complied with.

For Form A here referred to, see *post*, p. 460, No. 4b.

(*a.*) The affidavit shall state the name and description of the party on whose behalf the action is instituted, the nature of the claim, the name and nature of the property to be arrested, and that the claim has not been satisfied.

(*b.*) In an action of wages the affidavit shall state the national character of the vessel proceeded against; and if against a foreign vessel, that notice of the institution of the action has been given to the Consul of the State to which the vessel belongs, if there be one resident in London (a copy of the notice shall be annexed to the affidavit).

(*c.*) In an action of bottomry, the bottomry bond, and if in a foreign language also a notarial translation thereof, shall be produced for the inspection and perusal of the registrar, and a copy of the bond, or of the translation thereof, certified to be correct, shall be annexed to the affidavit.

(*d.*) In an action of distribution of salvage the affidavit shall state the amount of salvage money awarded or agreed to be accepted, and the name, address, and description of the party holding the same.

(*e*.) The Court or judge may in any case, if he think fit, allow the writ of summons to issue although the affidavit may not contain all the required particulars. In a wages cause he may also waive the service of the notice, and in a cause of bottomry, the production of the bond. Order V. rr. 11a—12a.

The introductory portion of this rule, printed in italics, was repealed and a different provision substituted, by R. S. C. Dec. 1875, r. 3. The last-mentioned rule has itself been repealed by R. S. C. Feb. 1876, r. 4, and the above provision substituted. The difference between the original rule and the present is, that under the former the filing of the prescribed affidavit must precede the issue of the writ, which included in it the warrant for arrest: O. II., r. 7, *ante*, p. 186; under the latter, it must precede the warrant of arrest: which may be issued at any time after the writ. As to service of both documents, see O. IX., rr. 9a and 10a, *post*, p. 205.

12. *If, when any property is under arrest in Admiralty, a second or subsequent action is instituted against the same property, the solicitor in such second action may, subject to the preceding rules, take out a writ of summons in rem and cause a caveat against the release of the property to be entered in the Caveat Release Book hereinafter mentioned.* R. 15. *Second actions in Admiralty.*

12a. Order V., Rule 12, of "The Rules of the Supreme Court," is hereby annulled. R. 12a. (R. S. C., Dec., 1875, r. 4.)

ORDER VI. Order VI.

CONCURRENT WRITS.

1. The plaintiff in any action may, at the time of or at any time during twelve months after the issuing of the original writ of summons, issue one or more concurrent writ or writs, each concurrent writ to bear teste of the same day as the original writ, and to be marked with a seal bearing the word "concurrent," and the date of issuing the concurrent writ; and such seal shall be impressed upon the writ by the proper officer: Provided always, that such concurrent writ or writs shall only be in force for the period during which the original writ in such action shall be in force. R. 1. Concurrent writs may be issued.

Formerly, under s. 9 of C. L. P. Act, 1852, a concurrent writ could only be issued within, and only remained in force for, six months

Order VI. rr. 1, 2.

after the issue of the original writ, that being the time for which the original writ was operative. The time is by this rule extended to twelve months.

By the terms of the rule the concurrent writ can only be issued within the twelve months for which the original writ is current. And under similar language in the section of the C. L. P. Act, 1852, above referred to, it was held that a concurrent writ could not be issued after the renewal of the original writ: *Cole* v. *Sherard*, 11 Ex. 482. See, however, O. LVII. r. 6, *post*, p. 413, as to the power of a Court or judge to enlarge the time for any proceeding; and *Re Jones, Eyre* v. *Cox*, 46 L. J. Ch. 316; W. N. 1877, p. 38, M. R.

As to the renewal of original and concurrent writs, see O. VIII., *post*, p. 199.

R. 2. Writs for service within and without jurisdiction.

2. A writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service, or whereof notice in lieu of service is to be given, out of the jurisdiction; and a writ for service, or whereof notice in lieu of service is to be given, out of the jurisdiction, may be issued and marked as a concurrent writ with one for service within the jurisdiction.

This rule is identical with s. 22 of C. L. P. Act, 1852.

When the defendant to be served is not a British subject, and is not in British dominions, notice of the writ and not the writ itself, is to be served upon him. See Forms under R. S. C. April 1880, *post*, p. 452, and *Beddington* v. *Beddington*, 1 P. D. 426, for the reason.

Order VII.

ORDER VII.

Disclosure by Solicitors and Plaintiffs.

R. 1. Plaintiff's solicitor.

1. Every solicitor whose name shall be indorsed on any writ of summons shall, on demand in writing made by or on behalf of any defendant who has been served therewith or has appeared thereto, declare forthwith whether such writ has been issued by him or with his authority or privity; and if such solicitor shall declare that the writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the Court or a judge.

This rule is substantially the same as s. 7 of the C. L. P. Act, 1852, except that under that section the attorney, if he stated that the writ had been issued by his authority, might further be required, on pain of contempt, to state the occupation and place of abode of the plaintiff. The words requiring this are omitted in this rule; but by O. IV. r. 1, *ante*, p. 189, the plaintiff's address must be indorsed on the writ.

Order VII. r. 2.

R. 2. Partners plaintiffs.

2. When a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitors shall, on demand in writing by or on behalf of any defendant, declare forthwith the names and places of residence of all the persons constituting the firm. And if the plaintiffs or their solicitors shall fail to comply with such demand, all proceedings in the action may, upon an application for that purpose, be stayed upon such terms as the Court or a judge may direct. And when the names of the partners are so declared, the action shall proceed in the same manner and the same consequences in all respects shall follow as if they had been named as the plaintiffs in the writ. But all proceedings shall, nevertheless, continue in the name of the firm.

By O. XVI. r. 10, *post*, p. 232, *any* party to an action in which partners *either sue or are sued* in the name of their firm may apply by summons for a statement of the names of the partners, to be furnished in such manner, and verified on oath or otherwise, as may be ordered.

As to procedings by and against partners in the name of their firm generally, see note to O. IX. r. 6, *post*, p. 202.

ORDER VIII.

Order VIII.

RENEWAL OF WRIT.

R. 1. Currency of writ. Renewal.

1. No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to a judge, or the district registrar, for leave to renew the writ; and the judge or registrar, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal, and so from time to time during the currency of the renewed writ. And the writ shall in such case be renewed by being marked with a seal bearing the date of the day, month, and year of such renewal; such seal to be provided and kept for that purpose at the proper office, and to be impressed upon the writ by the proper officer, upon delivery to him by the plaintiff or his solicitor of a memorandum in Form No. 5, in Appendix A, Part I.; and a writ of summons so renewed shall remain in force and be

Order VIII. rr. 1, 2.

available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons.

For Form No. 5, see *post*, p. 460; and for form of order see H. No. 20, *post*, p. 584.

This rule introduces two important changes. On the one hand, a writ of summons was formerly in force, unless renewed, only for six months (C. L. P. Act, 1852, s. 11); whereas under this rule it will continue current for twelve months. On the other hand, the writ, if not served, might, as of right, during its currency, be renewed for six months from the date of renewal, and so on from time to time during the currency of the renewed writ; so as to keep the action alive without service, and thereby defeat the Statute of Limitations for an indefinite time (*Ibid.*); whereas under this rule a writ can only be renewed by leave, if reasonable efforts have been made to serve the defendant, or for other good reason.

It is only the original writ that can be renewed. Where, therefore, a writ, which had been once renewed, had been lost, the Court refused to direct the officer to send a verified copy: *Davies* v. *Garland*, 1 Q. B. D. 250.

The twelve months run from the date of the writ: *Re Jones, Eyre* v. *Cox*, 46 L. J. Ch. 316; W. N. 1877, p. 38, M. R.

By O. LVII. r. 6, *post*, p. 413, a Court or judge may enlarge the time for any proceeding, and that, although the prescribed time has elapsed. In *Re Jones, Eyre* v. *Cox*, *suprà*, Jessel, M. R., allowed a writ to be renewed after its year of currency had expired. But where the statute of limitation had in the meantime run, the Queen's Bench Division held that it could not renew the writ: *Doyle* v. *Kaufman*, 3 Q. B. D. 7, approved, but affirmed on another ground, 3 Q. B. D. 340, C. A.

R. 2. Effect of renewed writ.

2. The production of a writ of summons purporting to be marked with the seal of the Court, showing the same to have been renewed in manner aforesaid, shall be sufficient evidence of its having been so renewed, and of the commencement of the action as of the first date of such renewed writ for all purposes.

This rule is taken from s. 13 of the C. L. P. Act, 1852.

Order IX.

ORDER IX.

Service of Writ of Summons.

1. *Mode of Service.*

R. 1. Undertaking to accept service.

1. No service of writ shall be required when the defendant, by his solicitor, agrees to accept service, and enters an appearance.

See O. XII. r. 14, *post*, p. 214.

Order IX. r. 2.

2. When service is required the writ shall, wherever it is practicable, be served in the manner in which personal service is now made, but if it be made to appear to the Court or to a judge that the plaintiff is from any cause unable to effect prompt personal service, the Court or judge may make such order for substituted or other service, or for the substitution of notice for service, as may seem just.

R. 2. Personal service.

Substituted service.

As to the practice in obtaining an order for substituted service, see O. X., *post*, p. 206.

Substituted service was not in use in the Common Law Courts. The equivalent practice was that provided by s. 17 of the C. L. P. Act, 1852, under which if reasonable efforts had been made to effect service, and either the writ had come to the defendant's knowledge, or he wilfully evaded service, an order might be obtained to proceed as if personal service had been effected.

In Chancery, substituted service of a copy of the bill was allowed, by leave of the Court, in all cases in which, under the older practice, substituted service of the subpœna might have been allowed: Cons. Orders, O. X. r. 2. The cases decided upon this matter will be found in Morgan's Acts and Orders, p. 419, ed. 4; 457, ed. 5: Dan. Ch. Pr. 370, ed. 5.

In Admiralty, by Admiralty Rules, 29th Nov. 1859, Rule 170, substituted service of a citation in personam might be allowed, or service dispensed with altogether, where personal service could not be effected.

In Probate cases, by Rules, Contentious Business, 1862, rr. 18, 19, citations might be served within Great Britain or Ireland, if personal service could not be effected, as the judge or registrar directed. Out of the United Kingdom, they might be served by advertisement, under like directions.

This rule gives, in terms, a very wide discretion to the Courts: for it allows substituted service to be ordered if, from any cause, the plaintiff is unable to effect prompt personal service.

No order will be made for substituted service of a writ which could not have effectually been served personally: as a writ against a colonial government: *Sloman* v. *Governor of New Zealand*, 1 C. P. D. 563, C. A.

The mode of substituted service to be allowed in any case must, of course, depend upon the circumstances of the particular case: see *Cook* v. *Dey*, 2 Ch. D. 218, V.-C. H.; *Crane* v. *Jullion*, *Ibid.* 220, V.-C. H.; *Capes* v. *Brewer*, 24 W. R. 40, M. R.; *Rafael* v. *Ongley*, 34 L. T. 124, V.-C. H.; *Armitage* v. *Fitzwilliam*, W. N. 1875, p. 238, Quain, J., at Chambers; *Bank of Whitehaven* v. *Thompson*, W. N. 1877, p. 45, V.-C. H.; *Whitley* v. *Honeywell*, 24 W. R. 851, P. D.; *Watt* v. *Barnett*, 3 Q. B. D. at 364, C. A.; *Hartley* v. *Dilke*, 35 L. T. 706. *The Pomerania*, 4 P. D. 195.

Where an order for substituted service has been made, and judgment has been signed, the Court may, in the exercise of its discretion, set aside the judgment if the defendant show merits, and that he had no notice of the proceedings. In such case terms may be imposed. *Watt* v. *Barnett*, 3 Q. B. D. 183, affirmed 3 Q. B. D. 363, C. A. See, too, *The Pomerania*, 4 P. D. 195, as to change of solicitors.

An objection to an order made as to the service of a writ, must

Order IX. r. 2—6a.

be taken by application to set aside the order, and not pleaded as a defence to the action: *Preston* v. *Lamont*, 1 Ex. D. 363, C. A. Substituted service duly effected is equivalent for all purposes to personal service: *Watt* v. *Barnett*, 3 Q. B. D. at 366, C. A. *per* Jessel, M. R.

3. *On particular Defendants.*

R. 3. Husband and wife.

3. When husband and wife are both defendants to the action, service on the husband shall be deemed good service on the wife, but the Court or a judge may order that the wife shall be served with or without service on the husband.

R. 4. Infant.

4. When an infant is a defendant to the action, service on his or her father or guardian, or if none, then upon the person with whom the infant resides or under whose care he or she is, shall, unless the Court or judge otherwise orders, be deemed good service on the infant; provided that the Court or judge may order that service made or to be made on the infant shall be deemed good service.

R. 5. Person of unsound mind.

5. When a lunatic or person of unsound mind not so found by inquisition is a defendant to the action, service on the committee of the lunatic, or on the person with whom the person of unsound mind resides or under whose care he or she is, shall, unless the Court or judge otherwise orders, be deemed good service on such defendant.

In the case of a lunatic, so found by inquisition, but where no committee had been appointed, the Court directed service of the writ upon the keeper of the asylum where she resided: *Thaun* v. *Smith*, 27 W. R. 617.

2. *On Partners and other Bodies.*

R. 6. Partners.

6. Where partners are sued in the name of their firm, the writ shall be served either upon any one or more of the partners or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and, subject to the Rules hereinafter contained, such service shall be deemed good service upon the firm.

R. 6a. Person doing business under firm.

6a. Where one person carrying on business in the name of a firm apparently consisting of more than one person shall be sued in the firm name, the writ may be served at the principal place within the jurisdiction of the business so carried on upon any person having at the

time of service the control or management of the business there; and, subject to any of the Rules of the Supreme Court, such service shall be deemed good service on the person so sued.

(R. S. C., June, 1876, r. 4.)

The power to partners to sue and be sued in the name of their firm is entirely new. The system adopted for giving effect to the change is shortly as follows:—

Power to partners to sue and be sued in the name of the firm is given by O. XVI., r. 10 (*post*, p. 232).

If partners are suing in the name of the firm they must, on demand of the defendant, disclose the names of the partners (O. VII., r. 2, *ante*, p. 199).

Whether suing or being sued, they may be ordered by a judge, on the application of any party to the action, to make a like disclosure (O. XVI. r. 10, *post*, p. 232).

If the firm is sued as such, service may be effected under this rule, in either of two ways:—

i. Upon any one or more of the partners;

ii. At the principal place of business of the partnership, upon any person having the control or management of the business.

The partners are to appear individually in their own names, but all subsequent proceedings still go on in the name of the firm (O. XII., r. 12, *post*, p. 213); and judgment must be against the firm, *Jackson* v. *Litchfield*, 8 Q. B. D. 476, C. A.

After judgment against the firm, execution may issue (O. XLII., r. 8, *post*, p. 364) against any property of the firm, or against any person admitted or adjudged to be a partner, or against any person served as a partner with the writ who has failed to appear. If the judgment creditor claims to be entitled to issue execution against any one else as a partner in the firm, he may apply for an order to that effect, and an issue may be directed to try the question.

It may well happen, however, that a business is carried on under a firm which, on the face of it, indicates several partners, whereas in fact the business is that of a single individual. In such case, any person bringing an action against the supposed partnership under the name of the firm would not be within the terms of the rules of the original schedule. This difficulty is dealt with by R. S. C., June, 1876, as follows. By O. XVI., r. 10a, *post*, p. 232, a person so carrying on business may be sued in the firm name. The above rule 6a, provides for service of the writ. O. XII., r. 12a, *post*, p. 213, provides for the defendant's appearance.

A person residing abroad, but carrying on business in this country under a firm apparently consisting of more than one person, may be sued in this country, and the writ served at his place of business in this country, under the above rule: *O'Neil* v. *Clason*, 46 L. J. Q. B. 191; though, if judgment be obtained, bankruptcy proceedings cannot be taken on it, *ex parte Blain*, 12 Ch. D. 522, C. A.

As to service upon corporations, whether English or foreign, see the next rule.

R. 7. Service on corporations and other bodies.

7. Whenever, by any statute, provision is made for service of any writ of summons, bill, petition, or other process upon any corporation, or upon any hundred, or the inhabitants of any place, or any society or fellowship, or any body or number of persons, whether corporate or

Order IX, rr. 7, 8.

otherwise, every writ of summons may be served in the manner so provided.

By the C. L. P. Act, 1852, s. 16, "Every such writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation; and every such writ issued against the inhabitants of a hundred or other like district may be served on the high constable thereof, or any one of the high constables thereof; and every such writ issued against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town or place not being part of a hundred or other like district, on some peace officer thereof."

It has been held that a foreign corporation having a place of business and trading in England may be sued in this country, and served in the manner pointed out in this section, the officer in England being for this purpose a head officer: *Newby* v. *Van Oppen*, L. R. 7 Q. B. 293; see also per Lord St. Leonards in *The Carron Iron Company* v. *Maclaren*, 5 H. L. C., at p. 459. But service on a mere booking clerk on a Scotch railway company at a station on an English railway over which they had running powers was held insufficient in *Mackereth* v. *Glasgow and South Western Ry. Co.*, L. R. 8 Ex. 149.

By the Companies' Act, 1862 (25 & 26 Vict., c. 89, s. 62, "Any summons, notice, order, or other document required to be served upon the company may be served by leaving the same, or sending it through the post in a prepaid letter addressed to the company, at their registered office."

Under somewhat similar words in 19 & 20 Vict. c. 47, s. 53, it was held that they did not include a writ of summons in an action: *Towne* v. *London and Limerick Steamship Company*, 5 C. B., N. S., 730. But it seems never to have been doubted that a bill in Chancery might be served under this section: Dan. Ch. Pr., p. 368, ed. 5; Morgan's Acts and Orders, p. 418, ed. 4; and that will be sufficient to import the section into the above rule.

Similar provisions are contained in the Companies' Clauses Act, 1845 (8 & 9 Vict., c. 16), s. 135, as to which see *Lawrenson* v. *Dublin Metropolitan Railway*, 37 L. T. 32, C. A.: the Lands Clauses Act, 1845 (8 Vict., c. 18), s. 134, with respect to service upon promoters; and the Railways Clauses Act, 1845 (18 Vict., c. 20), s. 138, as to railway companies; except that in all these cases writs are specially mentioned.

By 7 Will. IV. & 1 Vict., c. 73, s. 26, service upon a company chartered under that Act may be made upon the clerk of the company, or by leaving the writ at the head office, or, if the clerk shall not be known or found, on any agent or officer employed by the company, or by leaving the writ at the usual place of abode of such agent or officer.

As to service of writs on foreign corporations abroad, see O. XI., *post*, p. 209, and notes thereto.

A colonial government is not a corporation within the meaning of this rule: *Sloman* v. *Governor of New Zealand*, 1 C. P. D. 563, C. A.; nor is a foreign government: *Strousberg* v. *Republic of Costa Rica*, 29 W. R. 125, C. A.

R. 8.

4. *In Particular Actions.*

Service in

8. Service of a writ of summons in an action to recover land may, in case of vacant possession, when it cannot

otherwise be effected, be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property. Order IX. rr. 8—11.

recover land.

This rule is taken from s. 170 of the C. L. P. Act, 1852.

9. *In Admiralty actions in rem the writ shall be served by the Marshal or his substitutes, whether the property to be arrested be situate within the Port of London or elsewhere within the jurisdiction of the Court, and the solicitor issuing the writ shall, within six days from the service thereof, file the same in the registry from which the writ issued.* R. 9. *Service of writ in Admiralty action by Marshal.*

9a. Order IX., Rule 9, of the Rules of the Supreme Court is hereby annulled, and the following shall stand in lieu thereof: R. 9a. Service of warrant in Admiralty action. (R. S. C., Dec. 1875, r. 5.)

In Admiralty actions in rem the warrant of arrest shall be served by the Marshal or his substitutes, whether the property to be arrested be situate within the Port of London or elsewhere within the jurisdiction of the Court, and the solicitor issuing the warrant shall, within six days from the service thereof, file the same in the Registry.

10. *In Admiralty actions in rem, service of a writ of summons against ship, freight, or cargo on board is to be effected by the Marshal or his officer nailing or affixing the original writ for a short time on the main mast or on the single mast of the vessel, and, on taking off the process, leaving a true copy of it nailed or fixed in its place.* R. 10. *Mode of service in Admiralty action.*

10a. Order IX., Rule 10, of the Rules of the Supreme Court is hereby annulled, and the following shall stand in lieu thereof: R. 10a. Service of writ in Admiralty action. (R. S. C., Dec., 1875, r. 6.)

In Admiralty actions in rem service of a writ of summons against ship, freight, or cargo on board, is to be effected by nailing or affixing the original writ for a short time on the mainmast, or on the single mast of the vessel, and, on taking off the process, leaving a true copy of it nailed or fixed in its place.

The form of writ originally given in Admiralty actions in rem, included a warrant of arrest. The new form does not: O. II., r. 7a, *ante*, p. 186. The warrant of arrest is issued separately, under O. V., r. 11, *ante*, p. 196. Accordingly, under the former system the writ had to be served by the Marshal; now, only the warrant of arrest.

11. If the cargo has been landed or transhipped, ser- R. 11.

Order IX. rr. 11—13.

vice of the writ of summons to arrest the cargo and freight shall be effected by placing the writ for a short time on the cargo, and, on taking off the process, by leaving a true copy upon it.

Service on cargo.

R. 12. Service in custodian of cargo.

12. If the cargo be in the custody of a person who will not permit access to it, service of the writ may be made upon the custodian.

5. *Generally.*

R. 13. Indorsement of service.

13. The person serving a writ of summons shall, within three days at most after such service, indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default; and every affidavit of service of such writ shall mention the day on which such indorsement was made.

This rule is identical with s. 15 of the C. L. P. Act, 1852. It does not apply in cases of substituted service: *Dymond* v. *Croft*, 3 Ch. D. 512, C. A.

An amended writ must be served and indorsed in the same manner as an original writ, unless circumstances have taken place in the meantime to render this impossible: *The Cassiopeia*, 4 P. D. 188, C. A.

See *Hastings* v. *Hurley*, 16 Ch. D. 734, as to extension of time.

Order X.

ORDER X.

SUBSTITUTED SERVICE.

Substituted service. Affidavit.

Every application to the Court or a judge, under Order IX., Rule 2, for an order for substituted or other service, or for the substitution of notice for service, shall be supported by an affidavit setting forth the grounds upon which the application is made.

As to when substituted service may be ordered, see O. IX., r. 2. *ante*, p. 201. As to indorsement of service, see note to the last rule. The ordinary rule acted on by the masters seems to be to allow substituted service on an affidavit shewing three ineffectual calls at the defendant's house, two of which were made by appointment.

Order XI.

ORDER XI.

SERVICE OUT OF THE JURISDICTION.

R. 1. Service out

1. Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the

Court or a judge whenever the whole or any part of the subject matter of the action is land or stock, or other property situate within the jurisdiction, or any act, deed, will, or thing affecting such land, stock, or property, and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made, and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done or is situate within the jurisdiction.

Order XI. rr. 1, 1a. Of jurisdiction: in what cases.

1a. Whenever any action is brought in respect of any contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, when such contract was made or entered into within the jurisdiction, or whenever there has been a breach within the jurisdiction of any contract wherever made, the judge, in exercising his discretion as to granting leave to serve such writ or notice on a defendant out of the jurisdiction, shall have regard to the amount or value of the property in dispute or sought to be recovered, and to the existence in the place of residence of the defendant, if resident in Scotland or Ireland, of a local Court of limited jurisdiction, having jurisdiction in the matter in question, and to the comparative cost and convenience of proceeding in England or in the place of such defendant's residence, and in all the abovementioned cases no such leave is to be granted without an affidavit stating the particulars necessary for enabling the judge to exercise his discretion in manner aforesaid, and all such other particulars (if any) as he may require to be shown.

R. 1a. Circumstances to be considered by judge. (R. S. C., June, 1876, r. 5.)

Scotland and Ireland.

Affidavit.

Old practice.

Under Chan. Cons. Ord. X., Rule 7, the Court of Chancery had a discretionary power to order service on a defendant out of the jurisdiction in any suit whatever, without any of the qualifications expressed in this rule: *Drummond* v. *Drummond*, L. R. 2 Ch. 32; Dan. Ch. Pr. 375, ed. 5; Morgan's Acts and Orders, p. 423, ed. 4.

In the Probate Court, under Rule 19 of the Rules for Contentious Business, 1862, the practice was to allow service of citations on persons abroad by advertisement, under the directions of the judge or registrars, unless personal service were ordered. But if a person abroad had an agent in this country, the agent was served.

In the Common Law Courts, the power of serving a defendant out of the jurisdiction was governed by ss. 18 & 19 of the C. L. P.

Order XI. r. 1a.

Act, 1852: the former of these sections relating to British subjects resident abroad, the latter to foreigners. Those sections were limited in their operation in two respects. First, proceedings upon a writ served abroad could only be continued if there was "a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction." The words, "cause of action *which arose within the jurisdiction*," gave rise to a remarkable conflict of decision between the several Courts, only recently set at rest: see *Sichel* v. *Borch*, 2 H. & C. 954; *Allhusen* v. *Malgarejo*, L. R. 3 Q. B. 340; *Jackson* v. *Spittall*, L. R. 5 C. P. 542; *Durham* v. *Spence*, L. R. 6 Ex. 46; *Cherry* v. *Thompson*, L. R. 7 Q. B. 573; *Vaughan* v. *Weldon*, L. R. 10 C. P. 47.

Present rule.

The words of the present rule seem sufficiently wide to cover all the cases as to which doubt has arisen. A statement made out of the jurisdiction, amounting to slander of title to property within it, is not an act affecting the property within the meaning of the rule: *Casey* v. *Arnott*, 2 C. P. D. 24: see also *Harris* v. *Fleming*, 13 Ch. D. 208, where service out of the jurisdiction was allowed; and *McStephens* v. *Carnegie*, 42 L. T. 309, C. A., where it was disallowed. A charge made against the captain of a ship abroad which is reported to his employers at home, who in consequence dismiss him, is not within the scope of the rule: *Bree* v. *Marescaux*, 50 L. J., Q. B. 676, C. A. Secondly, the sections applied only to the case of persons residing elsewhere than in Scotland or Ireland. This restriction is no longer in force; and a writ may be ordered for service in Scotland or Ireland, no less than abroad: *Green* v. *Browning*, 34 L. T. 760, Q. B. D. But by r. 1a, *supra*, a judge, before ordering the writ to issue is, in the case of a Scotch or Irish defendant, to consider, amongst other things, the existence of an inferior court in the place of the defendant's residence, in which the action might be brought, and the comparative cost and convenience of trying in the one country or the other. Where a ship was in port at Cardiff, but the charter party had been entered into between plaintiff and defendant in Scotland, and both parties resided there, the Master of the Rolls refused to allow service out of the jurisdiction of a writ claiming an injunction to restrain the shipowner from dealing with the ship contrary to the charter party: *Ex parte McPhail*, 12 Ch. D. 632: see also *Tottenham* v. *Barry*, 12 Ch. D. 797, V.-C. H., contract made in London, but both parties resident in Ireland; and *Creswell* v. *Parker*, 11 Ch. D. 601, C. A., Scotch property administered by Scotch trustees, the cestui que trust living in England, in both of which cases leave was refused: *Green* v. *Browning*, 34 L. T. 760, contract made in England, plaintiff resident in England, defendant in Ireland; service was allowed.

Practice.

As regards the practice in case of service abroad, in Chancery the leave of the Court was obtained, and a time for appearance was limited by order: Chan. Cons. Ord. X., rule 7. And in the Probate Court, service on a person abroad was under the direction of the judge or registrars.

The Common Law practice was entirely different. Under ss. 18 and 19 of the C. L. P. Act, 1852, above referred to, a writ for service abroad, commonly known as a foreign writ, was issued, and it was served or notice of it given, as of course, without any leave obtained; the plaintiff on his own responsibility inserting a reasonable time for the defendant's appearance. The defendant when served might take no notice of the writ; or, without appearing, might apply to have it set aside if improperly issued: or

might appear. If he appeared, the action proceeded in the ordinary course. If he did not appear, and the writ had not been set aside, the plaintiff applied for leave to proceed with the action, notwithstanding the want of appearance, which leave might be given if everything was in order. **Order XI. rr. 1a—3.**

Now leave must be obtained beforehand, and the order must limit the time for appearance. (O. II., rr. 4 and 5, *ante*, pp. 185, 186, and r. 4, *infra*.) It cannot be made by a master or district registrar: O. LIV., r. 2a, *post*, p. 401. For form of order, see H. No. 18, *post*, p. 583. As to the affidavit for leave, see rule 3, *post*, and note thereto.

As to notice in lieu of service and proof of service of notice, see r. 5, *post*.

Serious difficulties arose in the Common Law Courts with respect to proceedings against foreign corporations situated abroad. It was held that s. 19 of the C. L. P. Act, 1852, which provided for service upon persons residing abroad, not being British subjects, did not apply to corporations abroad: *Ingate* v. *Austrian Lloyds*, 4 C. B., N. S. 704; see also *Armstrong* v. *Die Elbinger Actien-Gesellschaft*, 23 W. R. 94, Ex. But this decision turned entirely upon the construction of the particular Act in question; and there is nothing in the words of the present rules to limit their operation to the case of natural persons. A foreign corporation may, therefore, now be served abroad: *Scott* v. *Royal Wax Candle Co.*, 1 Q. B. D. 404. See, too, *Westman* v. *Aktinbolaget Sneckanfabrik*, 1 Ex. D. 237, C. A.; but a foreign sovereign or state cannot be so served: *Strousberg* v. *Republic of Costa Rica*, 29 W. R., 125, C. A.

As to the mode of service upon foreign corporations having a place of business in England, see note to O. IX., r. 7, *ante*, p. 204.

The objection that the cause of action is not such that a writ ought to issue out of the jurisdiction cannot be pleaded. It is only ground for an application to a judge to set aside the writ, whose decision may be appealed from: *Preston* v. *Lamont*, 1 Ex. D. 361.

The rules of this order apply to notices to third parties, under O. XVI., rr. 17 and 18: *Swansea Shipping Co.* v. *Duncan*, 1 Q. B. D. 644, C. A. **Third party notices.**

The words "within the jurisdiction" mean territorial jurisdiction. Therefore an Admiralty writ cannot issue for service abroad in respect of a wrong done on the high seas: *Re Smith*, 1 P. D. 300; *The Virar*, 2 P. D. 29 C. A. Nor can a writ issue for such service in respect of a wrong below low water mark, but within three miles of shore: *Harris* v. *Owners of Franconia*, 2 C. P. D. 173. **Extent of jurisdiction.**

2. In Probate actions service of a writ of summons or notice of a writ of summons may by leave of the Court or judge be allowed out of the jurisdiction. **R. 2. Probate action.**

3. Every application for an order for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by evidence, by affidavit, or otherwise, showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made. **R. 3. Affidavit to obtain leave.**

Order XI. rr. 3—5.

The affidavit mentioned in this rule is essential to the granting leave to issue the writ; and the affidavit must state the cause of action relied on, and that it arose within the jurisdiction. But if the affidavit be sufficient, the court will not allow it to be controverted, or try the cause on affidavit: *Great Australian Co.* v. *Martin*, 5 Ch. D. 1, C. A.

See directions for Chancery Division in *Stigand* v. *Stigand*, 19 Ch. D. 460.

To obtain leave to serve a defendant in Scotland under r. 1a, the affidavit should further show in what respect it would be cheaper and more convenient to try the case in England: *Wood* v. *McInnes*, 4 C. P. D. 67; *Tottenham* v. *Barry*, 12 Ch. D. 797. Where the amount at stake is very large it seems unnecessary for the affidavit to notice the provision of r. 1a as to there being a local court of limited jurisdiction: *Tottenham* v. *Barry* at 805.

R. 4. Time for appearance.

4. Any order giving leave to effect such service or give such notice shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given.

See a form of order H. No. 18, *post*, p. 583.

As to the present practice, see *Stigand* v. *Stigand*, 19 Ch. D. 460, declining to follow, *Young* v. *Brassey*, 1 Ch. D. 277.

As to a liquidation summons, see *Re British Imperial Corporation*, 5 Ch. D. 749.

R. 15. Service of notice in lieu of writ.

5. Notice in lieu of service shall be given in the manner in which writs of summons are served.

When the defendant to be served is not a British subject and is not in British dominions, notice of the writ and not the writ itself is to be served upon him. See form of writ A. 2b, *post*, p. 454, and *Beddington* v. *Beddington*, 1 P. D. 426; *Padley* v. *Camphausen*, 10 Ch. D. 550, C. A.

As to proof of service of notice, see *Bustros* v. *Bustros*, 14 Ch. D. 849. Notice cannot be served on a foreign sovereign or state; *Strousberg* v. *Republic of Costa Rica*, 29 W. R. 125 C. A.

Order XII.

ORDER XII.

APPEARANCE.

R. 1. Appearance when in London.

1. Except in the cases otherwise provided for by these rules a defendant shall enter his appearance in London.

R. 1a. Entry in Central office. Probate actions.

1a. Appearances entered in London shall be entered in the Central Office.

In Probate actions notice of appearances entered shall forthwith be given by the Central Office to the Probate Registry.

As to the general effect of the rules in this schedule upon the place of proceeding in actions, see note to O. V., r. 1, *ante*, p. 191. Appearance under protest in Admiralty actions is not abolished: *The Vivar*, 2 P. D. 29 C. A. **Order XII. rr. 1a—6a.** (R. S. C., April, 1880, r. 3.)

2. If any defendant to a writ issued in a district registry resides or carries on business within the district, he shall appear in the district registry. **R. 2.** Appearance: when in District Registry.

3. If any defendant neither resides nor carries on business in the district, he may appear either in the district registry or in London. **R. 3.** Appearance: when in either place.

As to the forms of appearance in this case in an Admiralty action, see *The General Birch*, 24 W. R. 24, P. D.

4. If a sole defendant appears, or all the defendants appear in the district registry, or if all the defendants who appear appear in the district registry and the others make default in appearance, then, subject to the power of removal hereinafter provided, the action shall proceed in the district registry. **R. 4.** Effect of appearance in District Registry.

As to the power of removal, see note to O. V., r. 1, *ante*, p. 191; s. 65 of the Act of 1873, *ante*, p. 67; and O. XXXV., rr. 11 to 14, *post*, p. 314.

5. If the defendant appears, or any of the defendants appear, in London, the action shall proceed in London; provided that if the Court or a judge shall be satisfied that the defendant appearing in London is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, such Court or judge may order that the action may proceed in the district registry, notwithstanding such appearance in London. **R. 5.** Effect of appearance in London.

6. *A defendant shall enter his appearance to a writ of summons by delivering to the proper officer a memorandum in writing, dated on the day of the delivering the same, and containing the name of the defendant's solicitor, or stating that the defendant defends in person. A defendant who appears elsewhere than where the writ is issued shall on the same day give notice to the plaintiff of his appearance, either by notice in writing served in the ordinary way, or by prepaid letter posted on that day in due course of post.* **R. 6.** Memorandum of appearance. Notice.

6a. *Order XII., Rule* 6, *is hereby annulled, and the following shall stand in lieu thereof:* **R. 6a.** Memorandum of

Order XII. rr. 6a—7.

appearance. (R. S. C. Feb. 1876, r. 5.)

Notice.

A defendant shall enter his appearance to a writ of summons by delivering to the proper officer a memorandum in writing, dated on the day of delivering the same, and containing the name of the defendant's solicitor, or stating that the defendant defends in person.

A defendant who appears elsewhere than where the writ is issued shall on the same day give notice of his appearance to the plaintiff's solicitor, or to the plaintiff himself, if he sues in person, either by notice in writing served in the ordinary way at the address for service within the district of the district registry, or by prepaid letter directed to such address, and posted on that day in due course of post.

R. 6b. Notice of appearance. (R. S. C., April, 1880, r. 6.)

6b. Order XII., Rule 6a, of the Rules of the Supreme Court is hereby annulled and the following shall stand in lieu thereof:—

A defendant shall enter his appearance to a writ of summons by delivering to the proper officer a memorandum in writing dated on the day of its delivery, and containing the name of the defendant's solicitor, or stating that the defendant defends in person.

He shall at the same time deliver to the officer a duplicate of the memorandum, which the officer shall seal with the official seal, showing the date on which it is sealed, and then return to the person entering the appearance, and the duplicate memorandum so sealed shall be a certificate that the appearance was entered on the day indicated by the seal.

A defendant shall, on the day on which he enters an appearance to a writ of summons, give notice of his appearance to the plaintiff's solicitor, or, if the plaintiff sues in person, to the plaintiff himself. The notice may be given either by notice in writing served in the ordinary way at the address for service, or by prepaid letter directed to that address and posted on the day of entering appearance in due course of post, and shall in either case be accompanied by the sealed duplicate memorandum.

On the construction of the old rule see *Smith* v. *Dobbin*, 3 Ex. D. 338, C. A. The new rule requires the defendant in all cases to give notice of appearance. For forms of entry of appearance see Forms A. No. 6, *post*, p. 460; E. Nos. 21, 22, *post*, pp. 555, 556, and for a form of notice of appearance see B. No. 20, *post*, p. 483. As to dispensing with a statement of claim, which must be done at the time of appearance, see O. XIX. r. 2, *post*, p. 248.

.7. Idress for

7. The solicitor of a defendant appearing by a solicitor shall state in such memorandum his place of business,

and, if the appearance is entered in the London office, a place, to be called his address for service, which shall not be more than three miles from Temple Bar, and if the appearance is entered in a district registry, a place, to be called his address for service, which shall be within the district. Order XII. rr. 7—12a. service of defendant's solicitor.

As to the district of a District Registry, see s. 60 of the Act of 1873, *ante*, p. 65; and Order in Council issued under that section, *post*, p. 687.

8. A defendant appearing in person shall state in such memorandum his address, and, if the appearance is entered in the London Office, a place, to be called his address for service, which shall not be more than three miles from Temple Bar, and if the appearance is entered in a district registry, a place, to be called his address for service, which shall be within the district. R. 8. Address for service of defendant in person.

9. If the memorandum does not contain such address, it shall not be received; and if any such address shall be illusory or fictitious, the appearance may be set aside by the Court or a judge on the application of the plaintiff. R. 9. Defective memorandum.

10. The memorandum of appearance shall be in the Form No. 6, Appendix (A), Part I., with such variations as the circumstances of the case may require. R. 10. Form.

For this form, see *post*, p. 460, No. 6, and Forms E. 21, 22, *post*, pp. 555, 556.

11. Upon receipt of a memorandum of appearance, the officer shall forthwith enter the appearance in the cause book. R. 11. Entry of appearance in cause book

12. Where partners are sued in the name of their firm, they shall appear individually in their own names. But all subsequent proceedings shall, nevertheless, continue in the name of the firm. R. 12. Appearance by partners.

If one of the partners does not appear, judgment cannot be entered separately against him, *Jackson* v. *Litchfield*, 8 Q. B. D., 474, C. A.

12a. Where any person carrying on business in the name of a firm apparently consisting of more than one person shall be sued in the name of the firm, he shall appear in his own name; but all subsequent proceedings shall, nevertheless, continue in the name of the firm. R. 12a. Appearance by person sued under firm. (R. S. C., June, 1876, r. 6.)

As to the general effect of the rules upon actions by and against partners, and against persons carrying on business under firms, apparently consisting of several persons, see note to O. IX., rr. 6 and 6a, *ante*, pp. 202, 203.

Order XII. rr. 13—19.

R. 13. Appearance by several.

13. If two or more defendants in the same action shall appear by the same solicitor and at the same time, the names of all the defendants so appearing shall be inserted in one memorandum.

This is identical with Rule 2 of R. G., H. T., 1853.

R. 14. Undertaking to appear.

14. A solicitor not entering an appearance in pursuance of his written undertaking so to do on behalf of any defendant shall be liable to an attachment.

This is identical with Rule 3 of R. G., H. T., 1853. See O. IX., r. 1, *ante*, p. 200.

R. 15. Appearance at any time before judgment.

15. A defendant may appear at any time before judgment. If he appear at any time after the time limited for appearance he shall, on the same day, give notice thereof to the plaintiff's solicitor, or to the plaintiff himself if he sues in person, and he shall not, unless the Court or a judge otherwise orders, be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ.

This Rule is in substance the same as s. 29 of the C. L. P. Act, 1852. See O. XI. r. 4, as to defendants served out of the jurisdiction; and see forms of writs, *post*, pp. 449—452.

R. 16. Appearance by intervener in Probate action.

16. In Probate actions any person not named in the writ may intervene and appear in the action as heretofore, on filing an affidavit showing how he is interested in the estate of the deceased.

R. 17. Appearance by intervener in Admiralty action.

17. In an Admiralty action in rem any person not named in the writ may intervene and appear as heretofore, on filing an affidavit showing that he is interested in the res under arrest, or in the fund in the registry.

R. 18. Appearance by landlord in action for land.

18. Any person not named as a defendant in a writ of summons for the recovery of land may by leave of the Court or judge appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or his tenant.

This and the three following rules are substantially the same as ss. 172, 173 and 174 of the C. L. P. Act, 1852, and Rule 113 of R. G., H. T., 153. See *Gledhill* v. *Hunter*, 14 Ch. D. 492, M. R.

R. 19. Form of ...arance ...andlord.

19. Any person appearing to defend an action for the recovery of land as landlord in respect of property where-of he is in possession only by his tenant, shall state in his appearance that he appears as landlord.

Order XII. rr. 20—22.

R. 20. Notice of appearance by landlord.

20. Where a person not named as defendant in any writ of summons for the recovery of land has obtained leave of the Court or judge to appear and defend, he shall enter an appearance according to the foregoing rules, intituled in the action against the party or parties named in the writ as defendant or defendants, and shall forthwith give notice of such appearance to the plaintiff's solicitor, or to the plaintiff if he sues in person, and shall in all subsequent proceedings be named as a party defendant to the action.

R. 21. Limited appearance in action for land. Notice.

21. Any person appearing to a writ of summons for the recovery of land shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in his memorandum of appearance or in a notice intituled in the cause, and signed by him or his solicitor; such notice to be served within four days after appearance; and an appearance where the defence is not so limited shall be deemed an appearance to defend for the whole.

R. 22. Form of notice.

22. The notice mentioned in the last preceding Rule may be in the form No. 7, in Part I. of Appendix (A) hereto, with such variations as circumstances may require.

For this form, see *post*, p. 461, No. 7, and E. No. 22, *post*, p. 556.

ORDER XIII.

Order XIII.

DEFAULT OF APPEARANCE.

R. 1. Infant or insane person.

1. Where no appearance has been entered to a writ of summons for a defendant who is an infant or a person of unsound mind not so found by inquisition, the plaintiff may apply to the Court or a judge for an order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action. But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of such application was after the expiration of the time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose

Order XIII. rr. 1—3.

care such defendant was at the time of serving such writ of summons, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of the father or guardian, if any, of such infant, unless the Court or judge at the time of hearing such application shall dispense with such last-mentioned service.

This rule is founded on Order VII., Rule 3, of the Consolidated Orders in Chancery; see Morgan's Acts and Orders, p. 400, ed. 4; Dan. Chan. Pr. p. 399, ed. 5.

As to service on infants and persons of unsound mind, see O. IX., rr. 4 and 5, *ante*, p. 202.

See *Taylor* v. *Pede*, 44 L. T. 514, as to this rule being merely permissive.

R. 2. Affidavit of service.

2. Where any defendant fails to appear to a writ of summons, and the plaintiff is desirous of proceeding upon default of appearance under any of the following rules of this Order, or under Order XV., Rule 1, he shall, before taking such proceeding upon default, file an affidavit of service, or of notice in lieu of service, as the case may be.

As to filing affidavits, see R. S. C. (Costs), O. V., r. 11, p. 606, and O. XXXVII., r. 15, as modified by O. XXXV., r. 3, *post*, p. 313.

As to the form of affidavit where notice of the writ is served in lieu of the writ itself, see *Bustros* v. *Bustros*, 14 Ch. D. 849. It was there held that an affidavit stating that the defendant had been personally served with "a notice in writing, a true copy of which is hereunto annexed," was sufficient.

R. 3. Writ specially indorsed.

3. In case of non-appearance by the defendant where the writ of summons is specially indorsed, under Order III., Rule 6, the plaintiff may sign final judgment for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs, but it shall be lawful for the Court or a judge to set aside or vary such judgment upon such terms as may seem just.

The indorsement referred to is an indorsement of the claim, where the claim is merely for a debt or a liquidated demand.

For the mode of entering judgment, on default of appearance in the Chancery Division; see Seton on Decrees, p. 12, ed. 4.

For forms of judgment under rules 3 to 5, see *post*, p. 541, No. 1; Seton, p. 7.

This rule corresponds to s. 27 of the C. L. P. Act, 1852. Under that section, however, execution could not issue on the judgment entered till the expiration of eight days from the last day for appearance. There is no such restriction in this rule. And the general rule now is that execution may issue immediately upon

any judgment for the recovery of money: O. XLII., r. 15, *post*, p. 367.

Under that section, too, it was expressly provided that an application to set aside a judgment must be based upon affidavits "accounting for the non-appearance and disclosing a defence upon the merits." By the present rule the matter is left at large to the discretion of the Court or judge; but it can hardly be supposed that a judge will set aside a judgment without having the non-appearance explained, and a defence shown. The terms commonly imposed have been the payment by the defendant of the costs of the application, pleading without delay, and sometimes bringing money into court.

Mere lapse of time is not necessarily a bar to an application to set aside a judgment by default. Where judgment in default of appearance had been signed against a married woman who had separate estate without power of anticipation, and ten months afterwards application was made to set it aside, the application was granted unconditionally, and leave to defend given: *Atwood* v. *Chichester*, 3 Q. B. D. 722, C. A.

R. 4. Several defendants to writ specially indorsed.

4. Where there are several defendants to a writ specially indorsed for a debt or liquidated demand in money, under Order III., Rule 6, and one or more of them appear to the writ, and another or others of them do not appear, the plaintiff may enter final judgment against such as have not appeared, and may issue execution upon such judgment without prejudice to his right to proceed with his action against such as have appeared.

The provisions of this rule are new. Formerly, in such a case, the plaintiff might sign judgment against the defendants who did not appear, and might issue execution against them; but, if he did so, he abandoned his right to proceed against the other defendants. Or he might, before levying execution against the defaulters, declare and proceed with the action against the other defendants. But in this case the judgment already signed became a mere interlocutory one; and the plaintiff could never put it in force unless and until he succeeded in obtaining judgment in the action against the other defendants. See s. 33 of the C. L. P. Act, 1852; notes to that section in Day's C. L. P. Acts, p. 69, ed. 4.

R. 5. Liquidated claim, where writ not specially indorsed. Particulars.

5. Where the defendant fails to appear to the writ of summons and the writ is not specially indorsed, but the plaintiff's claim is for a debt or liquidated demand only, no statement of claim need be delivered, but the plaintiff may file an affidavit of service, or notice in lieu of service, as the case may be, and a statement of the particulars of his claim in respect of the causes of action stated in the indorsement upon the writ, and may, after the expiration of eight days, enter final judgment for the amount shown thereby and costs to be taxed, provided that the amount shall not be more than the sum indorsed upon the writ besides costs.

Order XIII. rr. 5, 6.

Under s. 28 of the C. L. P. Act, 1852, the plaintiff filed a declaration, and if no plea were pleaded he could then, if the amount claimed were indorsed on the writ, sign final judgment for default of a plea for the amount so shown and costs.

R. 5a.

Writ in district registry. (R. S. C., Dec. 1875, r. 7.)

5a. Where a defendant fails to appear to a writ of summons, issued out of a district registry, and the defendant had the option of entering an appearance either in the district registry or in the London office, judgment for want of appearance shall not be entered by the plaintiff until after such time as a letter posted in London on the previous evening, in due time for delivery to him on the following morning, ought, in due course of post, to have reached him.

See O. XII., r. 6b, *ante*, p. 212.

R. 6.

Claim for damages.

6. Where the defendant fails to appear to the writ of summons and the plaintiff's claim is not for a debt or liquidated demand only, but for detention of goods and pecuniary damages, or either of them, no statement of claim need be delivered, but interlocutory judgment may be entered and a writ of inquiry shall issue to assess the value of the goods and the damages, or the damages only, as the case may be, in respect of the causes of action disclosed by the indorsement on the writ of summons. But the Court or a judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way in which any question arising in any action may be tried.

Assessment of damages.

For forms of interlocutory judgment, and of judgment after assessment of damages, see *post*, p. 541, No. 3; Seton, pp. 7, 8.

The practice, in actions at law, formerly was, under s. 28 of the C. L. P. Act, 1852, that the plaintiff, in the case provided for by this rule, filed a declaration, and then, if no plea were pleaded, signed interlocutory judgment for want of a plea. Then a writ of inquiry issued to assess the damages; or if the amount of damages was substantially a matter of mere calculation, it might be referred to a master, under s. 94 of the C. L. P. Act, 1852. Under the present rule, it will be observed, interlocutory judgment may be entered immediately upon default of appearance; and the indorsement on the writ will govern the inquiry as to damages, without any pleadings.

A more important change is made by the last sentence of this rule. The assessment of damages often involves questions, both of law and of fact, as difficult as any that can possibly arise. It may be found of great advantage that, for the future, questions of damages may be ordered to be tried by a judge, or a judge and jury, or a judge with assessors, or a referee, official or special. See O. XXXVI., *post*, p. 317.

It would seem that, under this rule, where the action is brought for the specific recovery of chattels, the plaintiff may, upon default

of appearance, have judgment for the delivery of the chattels; and may then enforce that judgment under O. XLII., r. 4, *post*, p. 363: *Ivory* v. *Cruickshank*, W. N. 1875, p. 249, per Quain, J., at Chambers.

There seems here to be a *casus omissus* in the Rules. No provision is made for the case where an action for damages is brought against several defendants, some of whom appear, while the others do not. Perhaps in this case the provisions of r. 9, *post*, may apply.

R. 7. Action for land.

7. In case no appearance shall be entered in an action for the recovery of land, within the time limited for appearance, or if an appearance be entered but the defence be limited to part only, the plaintiff shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply.

This is in substance the same as s. 177 of the C. L. P. Act, 1852. For form of judgment, see *post*, p. 541; Seton, p. 7.

R. 8. Assessment of damages in action for land.

8. Where the plaintiff has indorsed a claim for mesne profits, arrears of rent, or damages for breach of contract, upon a writ for the recovery of land, he may enter judgment as in the last preceding Rule mentioned for the land; and may proceed as in the other preceding Rules of this order as to such other claim so indorsed.

No claim other than those mentioned in this rule can be joined with a claim for the recovery of land, without leave: O. XVII., r. 2, *post*, p. 244.

R. 9. Actions assigned to Chancery and Probate divisions. Other actions.

9. In actions assigned by the 34th section of the Act to the Chancery Division, and in Probate actions, and in all other actions not by the Rules in this Order otherwise specially provided for, in case the party served with the writ does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service the action may proceed as if such party had appeared.

The effect of this rule is to get rid entirely of the practice hitherto in use in Chancery of entering an appearance for any party in default. For the future, instead of such appearances being entered, and so all parties being formally before the Court, the action will, upon an affidavit of service (Rule 2, *supra*), proceed as if all parties had appeared.

In a case within this rule the plaintiff must deliver a statement of claim; he cannot move for judgment without it: *Minton* v. *Metcalf*, 46 L. J. Ch. 584, V.-C. H. As regards the mode of delivery, O. XIX., r. 6, provides that where the defendant does not appear, the pleading is to be delivered by filing it with the proper officer. Where, however, a statement of claim has been delivered

Order XIII. rr. 9, 10.

to the defendant along with the writ, there is no necessity also to file a statement of claim: *Renshaw* v. *Renshaw*, 49 L. J. Ch. 127. As to foreclosure suits, see *Patey* v. *Flint*, 48 L. J. Ch. 696. As to moving for judgment on admissions where one of several defendants has not appeared, see *Parsons* v. *Harris*, 6 Ch. D. 694. This rule has been held to apply to a defendant of unsound mind not so found by inquisition: *Taylor* v. *Pede*, 44 L. T. 514, Fry, J.

R. 10. *Admiralty actions.*

10. *In an Admiralty action in rem, in which an appearance has not been entered, the plaintiff may proceed as follows:—*

(a.) *He may, after the expiration of twelve days from the filing of the writ of summons, take out a notice of sale, to be advertised by him in two or more public journals to be from time to time appointed by the judge.*

(b.) *After the expiration of six days from the advertisement of the notice of sale in the said journals, if an appearance has not been entered, the plaintiff shall file in the registry an affidavit to the effect that the said notices have been duly advertised, with copies of the journals annexed, as also such proofs as may be necessary to establish the claim, and a notice of motion to have the property sold.*

(c.) *If, when the motion comes before the judge, he is satisfied that the claim is well founded, he may order the property to be appraised and sold, and the proceeds to be paid into the registry.*

(d.) *If there be two or more actions by default pending against the same property, it shall not be necessary to take out a notice of sale in more than one of the actions; but if the plaintiff in the first action does not, within eighteen days from the filing of the writ in that action, take out and advertise the notice of sale, the plaintiff in the second or any subsequent action may take out and advertise the notice of sale, if he shall have filed in the registry a writ of summons in rem in such second or subsequent action.*

(e.) *Within six days from the time when the proceeds have been paid into the registry, the plaintiff in each action shall, if he has not previously done so, file his proofs in the registry and have the action placed on the list for hearing.*

(f.) *In an action of possession, after the expiration of six days from the filing of the writ, if an appearance has not been entered, the plaintiff may, on filing in the*

registry a memorandum, take out a notice of proceeding in the action, to be advertised by him in two or more public journals to be from time to time appointed by the judge. Order XIII. r. 10.

(g.) *After the expiration of six days from the advertisement of the notice of proceeding in the said journals, if an appearance has not been entered, the plaintiff shall file in the registry an affidavit to the effect that the notice has been duly advertised, with copies of the journals annexed, as also such proofs as may be necessary to establish the action, and shall have the action placed on the list for hearing.*

(h.) *If when the action comes before the judge he is satisfied that the claim is well founded, he may pronounce for the same, and decree possession of the vessel accordingly.*

10. Order XIII., Rule 10 of the "Rules of the Supreme Court" is hereby annulled. (R. S. C. Dec. 1875, r. 8.)

It has been held, that the earlier rules of this order do not apply to an Admiralty action in rem, and that, the above rule having been abolished, proceedings upon default of appearance in such an action are governed by the Admiralty practice in force prior to the Judicature Acts: *The Polymede*, 1 P. D. 121.

ORDER XIV. Order XIV.

Leave to Defend where Writ specially Indorsed.

1. *Where the defendant appears on a writ of summons specially indorsed, under Order III., Rule 6, the plaintiff may, on affidavit verifying the cause of action, and swearing that in his belief there is no defence to the action, call on the defendant to show cause before the Court or a judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs; and the Court or judge may, unless the defendant, by affidavit or otherwise, satisfy the Court or judge that he has a good defence to the action on the merits, or disclose such facts as the Court or judge may think sufficient to entitle him to be permitted to defend the action, make an order empowering the plaintiff to sign judgment accordingly.* R. 1. *Application for judgment.*

Order XIV.

1a. Order XIV., Rule 1, of the Rules of the Supreme Court is hereby repealed, and the following Rule is substituted:—

R. 1a.

Application for judgment. (R. S. C., May, 1877, r. 3.)

Where the defendant appears to a writ of summons specially indorsed under Order III., Rule 6, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the debt or cause of action, verifying the cause of action, and stating that in his belief there is no defence to the action, call on the defendant to show cause before the Court or a judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs. A copy of the affidavit shall accompany the summons or notice of motion. The Court or a judge may thereupon, unless the defendant, by affidavit or otherwise, satisfy the Court or a judge that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to sign judgment accordingly.

For forms of order and final judgment under this rule, see *post*, Forms D, No. 9, and H, Nos. 4—7, pp. 544, 578. The plaintiff's affidavit under this rule need not be made before his summons issued: *Begg* v. *Cooper*, 27 W. R. 224, C. A. As to his affidavits in reply, see note to r. 3, *post*.

The original rule required the affidavit of the plaintiff personally: *Frederici* v. *Vanderzee*, 2 C. P. D. 70; and accordingly it was held that a corporation aggregate, being incapable of making an affidavit, could not have the benefit of this rule: *Bank of Montreal* v. *Cameron*, 2 Q. B. D. 536, C. A. The new rule removes this difficulty.

The order applies where the defendant is a corporation: *Shelford* v. *Louth and East Coast Railway*, 4 Ex. D. 317, C. A.

It does not apply where the defendant is a married woman having separate estate, see *Ortner* v. *Fitz Gibbon*, 50 L. J., Ch. 17; *Durrant* v. *Ricketts*, 8 Q. B. D. 178.

The fact that a Debtor's Summons in respect of the same transaction has been dismissed does not prevent the application of this order: *Ray* v. *Barker*, 4 Ex. D. 279, C. A. Where a debtor is really solvent, proceedings under this order and not by Debtor's Summons are the appropriate remedy: *Ex parte Sewell*, 13 Ch. D. 266, C. A.

This rule must be read with and subject to r. 6 of this order: *Ray* v. *Barker*, 4 Ex. D. 279, C. A. As to the cases in which judgment should or should not be ordered, see note to r. 3 of this order.

An appeal from an order for judgment under this rule must be brought within 21 days: *Standard Discount Co.* v. *La Grange*, 3 C. P. D. 67, C. A.

The indorsement referred to is an indorsement of particulars of the claim where the claim is merely for a debt or liquidated demand. See O. III. r. 6, *ante*, p. 188, and note thereto.

Order XIV. rr. 1a—3.

The procedure introduced by this order is an extension of the principle embodied in the Bills of Exchange Act, 1855, though the method of working it out is different. Under the Bills of Exchange Act (the procedure under which has been abolished in the High Court: see *ante*, p. 186; though it still exists in the inferior courts to which it has been applied by Order in Council), a defendant whose case falls within the Act and who is served with a writ in the proper form, must obtain leave before he can be allowed to appear and defend. The present order is of much wider application than the Bills of Exchange Act; for it applies in all cases where the plaintiff's claim is merely for a debt or liquidated demand, and the writ has been specially indorsed (O. III., r. 6, *ante*, p. 188).

Under this order the defendant appears as of right without any previous leave; and it lies upon the plaintiff to apply for an order for judgment notwithstanding appearance. As to the time for delivering a defence in such cases, see O. XXII., r. 3, *post*, p. 268.

R. 2. Procedure by summons.

2. The application by the plaintiff for leave to enter final judgment under the last preceding Rule shall be made by summons returnable not less than two clear days after service.

No time is limited by rule within which the plaintiff must make the application. It may be presumed, however, that such application will not be entertained unless made at an early opportunity.

R. 3. Showing cause.

3. The defendant may show cause against such application by offering to bring into Court the sum indorsed on the writ, or by affidavit. In such affidavit he shall state whether the defence he alleges goes to the whole or to part only, and if so, to what part, of the plaintiff's claim. And the judge may, if he think fit, order the defendant to attend and be examined upon oath; or to produce any books or documents or copies of or extracts therefrom.

Compare the language of this rule with Order 1a, which empowers the defendant to satisfy the judge by "affidavit *or otherwise*," that he has a good defence; and see on this point *Shelford* v. *Louth Railway*, 4 Ex. D. 317, C. A.

The grounds given in this rule and in rule 1a for allowing the defendant to defend are:—an offer to bring the amount into Court; satisfying the judge that he has a good defence on the merits; disclosing such facts as the judge thinks sufficient to entitle him to defend.

The facts are to be shown by affidavit, subject to the power of directing an oral examination or the production of books or documents. Where leave to defend has been given, an appeal against the discretion thus exercised will hardly ever be entertained: *Papayanni* v. *Coutpas*, W. N., 1880, p. 109, C. A. The order is only intended to apply to such cases as are already undefended: *Thompson* v. *Marshall*, 28 W. R. 220, C. A. Judgment ought not to be ordered if the defendant can show a prima facie defence, or satisfy the judge that he ought to be allowed to interrogate the

Order XIV. rr. 3a—5.

plaintiff: *Harrison* v. *Bottenheim*, 26 W. R. 362, C. A. For the purpose of resisting the plaintiff's application, hearsay evidence is not to be shut out: *Ibid.* Although the claim may be undisputed, the existence of a counter claim connected with the same transaction may be sufficient to entitle the defendant to defend: *Anglo-Italian Bank* v. *Davies*, 38 L. T. 197, C. A.; and a set-off entitles him to defend: *Groome* v. *Rathbone*, 41 L. T. 591. Where the nature of the claim involves the taking of accounts between the parties, this order is not applicable: *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, H. L.: see the general principles as to leave to defend stated by Lord Blackburn, at p. 705. A mere affidavit that there is a defence is not sufficient. But where the affidavit shows what the defence is, and gives reason for thinking it is substantial, and will be sustained by evidence, the defendant ought to be admitted unconditionally to defend: *Runnacles* v. *Mesquita*, 1 Q. B. D. 416. Where the defendant is a surety, and he has not acknowledged his indebtedness, and there is nothing to show that the defence is merely for delay, he is entitled to put the plaintiff to proof of his claim, and will be admitted to defend: *Lloyd's Banking Co.* v. *Ogle*, 1 Ex. D. 262. As to conditional leave to defend, see *Ray* v. *Barker*, 4 Ex. D. 279 C. A., and 27 W. R. 745.

A defendant is not entitled to defend as of right by bringing the sum claimed into court. The provisions of this rule must be read subject to the provisions of r. 1a: *Crump* v. *Cavendish*, 5 Ex. D. 211, C. A.

See Forms H. Nos. 4—7, *post*, p. 578.

The judge may, in his discretion, allow the plaintiff to file affidavits in reply to the defendant's affidavit: *Davis* v. *Spence*, L. R. 1 C. P. D. 719; *Girrin* v. *Grepe*, 13 Ch. D. 174, M. R.; *Rotheram* v. *Priest*, 49 L. J., C. P. 105; see too s. 45 of the C. L. P. Act, 1854.

As to the grounds on which a defence was allowed in the analogous procedure under the Bills of Exchange Act, see *Agra Bank* v. *Leighton*, 2 L. R. Ex. 56.

R. 4. Defence shown as to part.

4. If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted to be due, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted to be due, subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into Court by the sheriff, the taxation of costs, or otherwise, as the judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim.

See *Hanmer* v. *Flight*, 24 W. R. 346, C. P. D.; 36 L. T. 279, C. A., for an application of this rule. Where part of the claim is clearly due and the rest disputable, there is no power to give leave to defend on the condition that the defendant pays the plaintiff the portion admittedly due. The proper order is judgment for that portion and leave to defend as to the rest: *Dennis* v. *Seymour*, 4 Ex. D. 80.

R. 5. Defence shown by

5. If it appears to the judge that any defendant has a good defence to or ought to be permitted to defend the action, and that any other defendant has not such.

defence, and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter, and may issue execution upon such judgment without prejudice to his right to proceed with his action against the former.

Order XIV. rr. 5, 6. several defendants.

See O. XIII., r. 4, *ante*, p. 217.

6. Leave to defend may be given unconditionally or subject to such terms as to giving security, or otherwise, as the Court or a judge may think fit.

R. 6. Leave absolute or conditional.

See note to r. 3, *ante*, p. 223.

Where a defendant has brought money into court as the condition of being allowed to defend, and has got judgment, he is entitled to a return of the money although the plaintiff has given notice of appeal: *Yorkshire Banking Co.* v. *Beatson*, 4 C. P. D. 213.

ORDER XV.

Order XV.

APPLICATION FOR ACCOUNT WHERE WRIT INDORSED UNDER ORDER III., RULE 8.

1. In default of appearance to a summons indorsed under Order III., Rule 8, and after appearance unless the defendant, by affidavit or otherwise, satisfy the Court or a judge that there is some preliminary question to be tried, an order for the account claimed, with all directions now usual in the Court of Chancery in similar cases, shall be forthwith made.

R. 1. Application for account on default.

For form of order, see Seton on Decrees, p. 8, ed. 4; and *Gatti* v. *Webster*, 12 Ch. D. 771. As to costs, see *Beaney* v. *Elliott*, W. N. 1880, p. 99, M. R.

The indorsement referred to is an indorsement of a claim for an ordinary account; such as a partnership, or executorship, or ordinary trust account. It does not apply to a claim for account on the footing of "wilful default," *Re Bowen*, W. N. 1882, p. 44.

There were a large number of cases in the Court of Chancery in which an account is asked for, and in which, in the absence of some exceptional circumstances, the plaintiff is entitled to and obtained an order for an account as a matter of course; and when the relief sought was the administration of a deceased person's estate, the account could, in some cases, be quickly and cheaply obtained by the summary process called an administration summons, under the 15 & 16 Vict. c. 86, ss. 45, 47. This rule provides for two cases: first, default of appearance: in which case the order will be made as of right; secondly, appearance: in which case it is to be made unless the defendant shows that there is some question which ought to be tried first.

Order XV. r. 2.

R. 2. Procedure by summons.

2. An application for such order as mentioned in the last preceding Rule shall be made by summons, and be supported by an affidavit filed on behalf of the plaintiff, stating concisely the grounds of his claim to an account. The application may be made at any time after the time for entering an appearance has expired.

An affidavit of service must be filed before the application can be made on the ground of default of appearance: O. XIII., r. 2, *ante*, p. 216.

Order XVI.

ORDER XVI.

PARTIES.

R. 1. Plaintiffs. Judgment. Cost

1. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person or persons who shall not be found entitled to relief, unless the Court in disposing of the costs of the action shall otherwise direct.

The changes introduced by this and the following rules of this Order are very material changes. In nothing has there been a stronger contrast between Common Law and Chancery procedure than in their doctrines with respect to the parties who ought to be brought before the Court.

Subject to a few exceptions, the Common Law Courts were rigidly tied down to disposing of claims arising between exactly the same parties upon each side, and in the same rights. They could give a judgment for *A.* against *C.*, or against *C.*, *D.* and *E.*, but they could not give relief of one sort against *C.* and of another sort against *D.* and *E.*; nor could they give relief of one kind to *A.* and of another kind to *B.*, or of one kind to *A.* and *B.* jointly, and another to *A.* separately. All the plaintiffs, if more than one, had to be jointly entitled, and all the defendants jointly liable, with respect to every single matter upon which the Court was asked to adjudicate.

In Chancery, on the other hand, the course was to deal with the controversy or transaction forming the subject matter of the action as a whole, and endeavour to do complete justice with respect to it; and for that object the Court insisted on all the parties interested in the subject matter being brought before it. The extreme strictness of this rule has been usefully relaxed from

Order XVI. r. 1.

time to time in ways which, at this point, it is not necessary to specify; but in the main it has not been departed from.

The result has been, that a Court of Law could not handle the matter as a whole, however desirable it might be to do so; but was obliged to confine itself to the specific claim of one person against another. A Court of Equity could only deal with the matter as a whole, whether that were really necessary or not, and could not dispose of the mutual rights of particular persons singly, however convenient it might be to do so.

The Act of 1873, and the rules, give a very wide latitude as to the matters which may be disposed of in an action, the mode in which a cause may be dealt with, and the persons who may be made parties to it.

By s. 24 of the Act of 1873, *ante*, p. 19, the plaintiff may seek in any action to enforce any claim he could hitherto have enforced in any Court whether of law or equity. The defendant may raise any defence which would hitherto have been good either at law or in equity. He may also raise, by way of counter claim, not merely a pecuniary set-off but anything that he could have made the subject of a cross action or suit. And he may make such counter claim not only against the plaintiff, but against any third person, if only it be connected with the subject of the action.

The Court in its turn is bound to "grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided." (Act of 1873, s. 24, sub.-s. 7, *ante*, p. 25.)

On the other hand, the first clause of Rule 13, *post*, p. 234, is equally specific, that "no action shall be defeated by reason of the misjoinder of parties, and the Court may in every action deal with the matters in controversy so far as regards the rights and interests of the parties actually before it."

The provisions of this Order relating to the selection of parties, and those of O. XVII., relating to the joinder of various claims in the same action and in the same pleadings, are framed so as to give effect to the provisions just referred to.

All persons claiming any relief, *jointly, severally, or in the alternative*, may be made plaintiffs: Rule 1, *supra*, and O. XVII., r. 6, *post*, p. 246.

All persons against whom any relief is claimed, *jointly, severally, or in the alternative*, may be made defendants: Rule 3, *post*, p. 229. And the defendants need not all be interested in all the relief claimed or all the causes of action: Rule 4. See also Rules 5 and 6, *post*, p 230.

It is not necessary that either plaintiff or defendant should be concerned in all the matters in question in the same capacity. Subject to a few qualifications, either may be concerned partly in a representative capacity, partly personally: O. XVII., rr. 3, 4, 5, 6, *post*, p. 229.

The defendant also may, as co-defendants to his counter-claim, bring before the Court persons not already parties against whom he seeks any relief relating to or connected with the subject matter of the suit: s. 24, sub-s. 3 of the Act of 1873, *ante*, p. 20. See O. XIX., r. 3, *post*, p. 249, and note thereto.

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All parties may be added necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action: Rule 13, *post*, p. 234.

The present rule, it will be observed, authorizes the joinder as plaintiffs, not only of persons claiming jointly or in the alternative but of persons claiming severally. Accordingly, where eight persons brought an action of libel, it was held that they might rightly join, though no joint injury was shown, and they would, before the Act, have had to bring eight actions: *Booth* v. *Briscoe*, 2 Q. B. D. 496, C. A. The opinion expressed by Jessel, M. R., in the earlier case of *Appleton* v. *Chapel Town Paper Co.*, 45 L. J. Ch. 276, seems scarcely consistent with this decision. Of course, in such a case, the assessment of damages, or the award of any other relief, should be separate: *Booth* v. *Briscoe*, *ubi supra*.

As to the combined effect of this Order and O. XVII., see note to r. 1 of the latter.

See *Samuel* v. *Samuel*, 12 Ch. D. 152, and note to next rule.

R. 2.

Wrong plaintiff by mistake. Amendment.

2. Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff or plaintiffs, the Court or a judge may, if satisfied that it has been so commenced through a bonâ fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons to be substituted or added as plaintiff or plaintiffs upon such terms as may seem just.

It has often happened that actions have been inadvertently brought by the wrong person: as by *cestui que trust*, instead of trustee; by mortgagor, instead of mortgagee. Often, the same mistake has been made where it was a matter of real difficulty to say which of two persons ought to sue: as in the case of contracts made by agents, as to which it is often a question of much nicety to determine who ought to sue. Though the Common Law Courts had the largest powers of adding parties, or amending misdescriptions of parties, they had no power to substitute one plaintiff for another, such as this rule confers: see *De Gendre* v. *Bogardus*, L. R. 7 C. P. 409. A mistake of law is within this rule: *Ducket* v. *Gover*, 6 Ch. D. 82, M. R. But there must have been a genuine mistake: *Clowes* v. *Hilliard*, 4 Ch. D. 413, M. R.

One of several mortgagees can properly bring an action to foreclose, making his co-mortgagees defendants if they will not join as plaintiffs: *Luke* v. *South Kensington Hotel Co.*, 11 Ch. D. 121, C. A., overruling Fry, J. *ibid.* 7 Ch. D. 789. As to substituting an infant *cestui que trust* for the trustee as plaintiff, see *Tildesley* v. *Harper*, 3 Ch. D. 277. As to the conditions on which the assignor of a debt will be added as plaintiff when an action is commenced by the assignee, see *Turquand* v. *Fearon*, 4 Q. B. D. 280. An action was commenced by tenant for life, on a lease. After action brought, it was discovered that she had no power to give the lease. She died during suit, and the remainderman was added as co-plaintiff with her executor: *Long* v. *Crossley*, 13 Ch. D. 388. As to a shareholder making the company a co-plaintiff in an action against the directors, see *Pender* v. *Lushington*, 6 Ch. D. 70; *Silber Light Co.* v. *Silber*, 12 Ch. D. 717. When it was doubtful whether a road-contractor or the vestry ought to

sue a tramway company which had injured the road, the vestry was added as a co-plaintiff: *Val de Travers Asphalte Co.* v. *London Tramways Co.*, 48 L. J. C. P. 312, and see, too, *Blackburn Union* v. *Brooks*, 26 W. R. 57.

A new plaintiff cannot be substituted for the original plaintiff except by the consent of the original plaintiff: *Emden* v. *Carte*, 17 Ch. D. 169. In that case an uncertificated bankrupt commenced an action for services as an architect. The Court on the request of the trustee, added the trustee as a co-plaintiff under r. 13, and gave him the conduct of the action.

See r. 13, *post*, and note thereto, p. 234.

R. 3. Defendants. Judgment.

3. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

The rule here laid down as to defendants is exactly analogous to that given as to plaintiffs, by rule 1; and it has received a similar construction. In *Honduras Ry. Co.* v. *Leferre*, 2 Ex. D. 301, C. A., the plaintiffs sought to enforce a contract against the defendant on the ground that T., by whom it was made, was his agent to make it. The Court of Appeal, affirming the Exchequer Division, ordered T. to be added as a defendant; the plaintiff claiming to recover against him, in the alternative of his not having had authority to contract. The question in that case turned on the construction of r. 6. It was not necessary to decide whether under the present rule T. could have been originally made a defendant; and Cockburn, C. J., expressed doubt upon the point. The construction of the present rule came before the Court of Appeal upon similar facts, on appeal from Hall, V.-C., in *Child* v. *Stenning*, 5 Ch. D. 695. The action was for trespass to land, of which the plaintiff was lessee under W. The defence was a right of way granted by W. It was held that the plaintiff might well amend his action by adding W. as a defendant; claiming against him, in case the right of way was established, damages for breach of covenant for quiet enjoyment. See also *Edwards* v. *Lowther*, 45 L. J. C. P. 417; 24 W. R. 434.

The two following rules, 4 and 5, seem to be developments of the principle laid down by the present rule.

R. 4. Defendants not all interested in all the relief sought.

4. It shall not be necessary that every defendant to any action shall be interested as to all the relief thereby prayed for, or as to every cause of action included therein; but the Court or a judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in such action in which he may have no interest.

See note to the last Rule, and *Cox* v. *Barker*, 3 Ch. D. 359, C. A.

As to meaning of the words "cause of action" in this rule, see note to O. XVII., r. 1, *post*, p. 242.

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R. 5. Several defendants liable on one contract.

5. The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes.

See note to r. 3.

R. 6. Several defendants in cases of doubt.

6. Where in any action, whether founded upon contract or otherwise, the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that in such action the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties to the action.

See note to r. 3, *ante*, p. 229.

R. 7. Trustees, executors, and administrators.

7. Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the parties beneficially interested in the trust or estate, and shall be considered as representing such parties in the action; but the Court or a judge may, at any stage of the proceedings, order any of such parties to be made parties to the action, either in addition to or in lieu of the previously existing parties thereto.

As to denial of representative character, see O. XIX., r. 11, *post*, p. 256.

This rule appears to be founded on Rule 9 of the Chancery Procedure Act, 15 & 16 Vict. c. 86, s. 42, embodied in Rule 11 of this Order, *post*, p. 233.

This rule applies to actions for sale and partition under the Partition Acts: *Stace* v. *Gage*, 8 Ch. D. 451; *Simpson* v. *Denny*, 10 Ch. D. 28. In an action for redemption bare trustees of the equity of redemption can sue without the parties beneficially interested being joined: *Mills* v. *Jennings*, 13 Ch. D. 639.

See also *Re Rees*, 15 Ch. D. 490, as to parties interested in an administration decree, and *Loveny* v. *Smith*, 15 Ch. D. 655, as to rectification of marriage settlement, also *Re Cooper*, W. N. 1882, p. 55.

R. 8. Married women and infants.

8. Married women and infants may respectively sue as plaintiffs by their next friends, in the manner practised in the Court of Chancery before the passing of this Act; and infants may, in like manner, defend any action by their guardians appointed for that purpose. Married women may also, by the leave of the Court or a judge, sue or defend without their husbands and without a next friend, on giving such security (if any) for costs as the Court or a judge may require.

As to the same person being the next friend of infant plaintiffs, and also a defendant in the action, see *Lewis* v. *Nobbs*, 8 Ch. D. 591. As to removing the next friend of an infant plaintiff for

refusing to join in an appeal, see *Du Puy* v. *Welsford*, 28 W. R. 762.

Apart from the power given by this rule to the Court or a judge to allow a married woman to sue or defend alone, the rules applicable to married women before the Judicature Acts passed, still apply. Thus a creditor who sues a married woman having separate estate without power of anticipation, should join as defendants her husband and the trustees of her settlement: *Attwood* v. *Chichester*, 3 Q. B. D. 722, C. A. And where an action is brought to charge the earnings of a married woman which are her separate property under the Married Women's Property Act, 1870, the husband must be joined as a defendant: *Hancocks* v. *Lablache*, 3 C. P. D. 197. Where a married woman, having separate estate, was sued jointly with her husband, and without special leave appeared separately, the proceeding was held to be irregular, but leave to defend alone was given: *Noel* v. *Noel*, 13 Ch. D. 510. See further as to joining the trustees of a married woman: *Collett* v. *Dickenson*, 11 Ch. D. 687, and *Flower* v. *Buller*, 15 Ch. D. 665.

Married woman.

For a form of claim and decree against a married woman, see *Mc'Queen* v. *Turner*, 30 W. R. 80.

Under s. 11 of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), a married woman may sue alone in respect of her earnings or other separate estate under that Act; but in other cases a married woman who sues to recover separate estate, should sue by next friend, making her husband a defendant: *Roberts* v. *Evans*, 7 Ch. D. 830. Where a married woman sued alone, and the defendant applied to have the action stayed on this ground, but the application was refused, it was held on appeal that the refusal of the application was equivalent to leave to sue alone under this section: *Kingsman* v. *Kingsman*, 6 Q. B. D. 122, C. A.

The proper course, it seems, for a married woman who wishes to sue or defend alone, is to apply specially for leave: *Noel* v. *Noel*, 13 Ch. D. 510.

Whether security for costs should be required from a married woman or her next friend, and if so, at what time, is, under this rule, a matter entirely in the discretion of the Court: *Martano* v. *Mann*, 14 Ch. D. 419, C. A. See, too, *Noel* v. *Noel*, 13 Ch. D. 510; *Brown* v. *North*, 30 W. R. 530 C. A.

There is no provision for filing the authority given by a married woman to her next friend to commence an action for her: *Rogers* v. *Horn*, 26 W. R. 432. In *Swann* v. *Swann*, 43 L. T. 530, a writ was issued by a person, not a solicitor, as next friend of a married woman without employing a solicitor. The writ was set aside with costs against him. See, too, *Schjott* v. *Schjott*, 51 L. J. Ch. 368, C. A.

A married woman cannot be made a bankrupt: *Ex-p. Jones*, 12 Ch. D. 484 C. A.

R. 9.

9. Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the Court to defend in such action, on behalf or for the benefit of all parties so interested.

Numerous parties in the same interest.

This was long the practice of the Court of Chancery: see Dan. Ch. Pr. pp. 207, *et seq.*, 1088, ed. 5; Chanc. Cons. Ord. XXXV., rule 20; Morgan's Acts and Orders, 551, ed. 4.

A plaintiff suing under this rule must indorse his writ accordingly: See O. III., r. 4, *ante*, p. 187, and note thereto.

In *De Hart* v. *Stevenson*, 1 Q. B. D. 313, it was held that one

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part-owner of a ship might sue under this rule on behalf of himself and his co-owners for freight. As to co-owners of a patent, see *Sheehan* v. *Great Eastern Railway*, 16 Ch. D. 59. See further as to bondholders: *Fraser* v. *Cooper*, W. N. 1882, p. 65.

See *Watson* v. *Cave*, 17 Ch. D. 19 C. A., as to the course to be pursued where a representative action is brought, and one of the parties represented is dissatisfied with an order made therein.

See O. LI., r. 4, *post*, p. 393, and note thereto, as to test actions and the consolidation of actions.

As to costs, see *Re Mutual Society*, 18 Ch. D. 530.

R. 9a. Persons appointed to represent a class. (R. S. C. June, 1876, r. 7.)

9a. In any case in which the right of an heir-at-law or the next of kin or a class shall depend upon the construction which the Court may put upon an instrument, and it shall not be known or be difficult to ascertain who is or are such heir-at-law or next of kin or class, and the Court shall consider that in order to save expense or for some other reason it will be convenient to have the question or questions of construction determined before such hear-at-law, next of kin, or class shall have been ascertained by means of inquiry or otherwise, the Court may appoint some one or more person or persons to represent such heir-at-law, next of kin, or class, and the judgment of the Court in the presence of such person or persons shall be binding upon the party or parties or class so represented.

See *Re Peppitt's Estate*, 4 Ch. D. 230, V.-C. B.

R. 10. Partners.

10. Any two or more persons claiming, or being liable as co-partners, may sue or be sued in the name of their respective firms, if any; and any party to an action may in such case apply by summons to a judge for a statement of the names of the persons who are co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the judge may direct.

As to proceedings in actions by and against partners in the name of the firm, see O. VII., r. 2, *ante*, p. 199; O. IX., r. 6, *ante*, p. 202, and note thereto; O. XII., r. 12, *ante*, p. 213; O. XIX., r. 11, *post*, p. 256; O. XLII., r. 8, *post*, p. 364.

An order to disclose the names of partners under this rule is not an order for discovery within the meaning of O. XXXI., r. 20: *Pike* v. *Keene*, 24 W. R. 322. Ex. D.

See a form of order under this rule in the Appendix of Forms to the Rules of April, 1880, *post*, p. 580.

Dissolution.

It is very doubtful whether the rule applies to the case of a partner who has dissolved partnership before action brought, though he was a partner when the debt sued on was contracted: *Ex parte Young*, 19 Ch. D. 124, C. A.

9a. n g r firm.

10a. Any person carrying on business in the name of a firm apparently consisting of more than one person may be sued in the name of such firm.

As to proceedings against persons sued as here provided, see O. IX., r. 6a, *ante*, p. 202, and note thereto; and O. XII., r. 12a, *ante*, p. 213.

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(R. S. C., June, 1876, r. 8.)

11. Subject to the provisions of the Act, and these Rules, the provisions as to parties, contained in section 42 of 15 and 16 Victoria, chapter 86, shall be in force as to actions in the High Court of Justice.

R. 11.

Provisions of 15 & 16 Vict. c. 86, s. 42.

By the Chancery Procedure Act, 15 & 16 Vict., c. 86, s. 42, it is enacted that: It shall not be competent to any defendant in any suit in the said Court [that is, the Court of Chancery] to take any objection for want of parties to such suit, in any case to which the rules next hereinafter set forth extend; and such rules shall be deemed and taken as part of the law and practice of the said Court, and any law or practice of the said Court inconsistent therewith shall be and is hereby abrogated and annulled:

"RULE 1.—Any residuary legatee or next of kin may, without serving the remaining residuary legatees or next of kin, have a decree for the administration of the personal estate of a deceased person.

"RULE 2.—Any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold, may, without serving any other legatee or person interested in the proceeds of the estate, have a decree for the administration of the estate of a deceased person.

"RULE 3.—Any residuary devisee or heir may, without serving any co-residuary devisee or co-heir, have a like decree.

"RULE 4.—Any one of several *cestuis que trust* under any deed or instrument may, without serving any other of such *cestuis que trust*, have a decree for the execution of the trusts of the deed or instrument.

"RULE 5.—In all cases of suits for the protection of property pending litigation, and in all cases in the nature of waste, one person may sue on behalf of himself and of all persons having the same interest.

"RULE 6.—Any executor, administrator, or trustee may obtain a decree against any one legatee, next of kin, or *cestui que trust* for the administration of the estate, or the execution of the trusts.

"RULE 7.—In all the above cases the Court, if it shall see fit, may require any other person or persons to be made a party or parties to the suit, and may, if it shall see fit, give the conduct of the suit to such person as it may deem proper, and may make such order in any particular case as it may deem just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

"RULE 8.—In all the above cases the persons who, according to the present practice of the Court, would be necessary parties to the suit, shall be served with notice of the decree, and after such notice they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit; and they may, by an order of course, have liberty to attend the proceedings under the decree; and any party so served may, within such time as shall in that behalf be prescribed by the general order of the Lord Chancellor, apply to the Court to add to the decree. (See Chanc. Cons. Ord. XXIII. rule 18; Dan. Ch. Pr. 363, ed. 5.)

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"RULE 9.—In all suits concerning real or personal estate, which is vested in trustees under a will, settlement, or otherwise, such trustees shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as the executors or administrators, in suits concerning personal estate, represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit; but the Court may, upon consideration of the matter, on the hearing, if it shall so think fit, order such persons, or any of them, to be made parties."

For cases decided upon this section, see Morgan's Acts and Orders, p. 197, ed. 4; p. 187, ed. 5; Dan. Ch. Pr., pp. 192, *et seq* 358, ed. 5.

Compare with Rule 9 in the section cited, Rule 7 of the present Order, *ante*, p. 230.

R. 12. Probate actions.

12. Subject as last aforesaid, in all Probate actions the rules as to parties, heretofore in use in the Court of Probate, shall continue to be in force.

R. 12a. Service of notice on infant or person of unsound mind. (R. S. C., April, 1880, r. 7.)

12a. Notice of a judgment or order pursuant to the Act 15 & 16 Vict. c. 86, s. 42, on an infant or person of unsound mind not so found by inquisition shall be served in the same manner as a writ of summons in an action.

This rule dispenses with the necessity of a special direction in such case. See O. IX., rr. 4, 5, *ante*, p. 202, as to service on infants and persons of unsound mind.

R. 12b. Parties to administration proceeding. (R. S. C., April, 1880, r. 8.)

12b. In any cause for the administration of the estate of a deceased person, no party to the cause other than the executor or administrator shall, unless by leave of the Judge, be entitled to appear either in Court or in Chambers on the claim of any person not a party to the cause against the estate of the deceased in respect of any debt or liability. The Judge may direct any other party to the cause to appear, either in addition to or in the place of the executor or administrator, upon such terms as to costs or otherwise as he shall think fit.

See "cause" defined by s. 100 of the Act of 1873, *ante*, p. 92.

R. 13. Misjoinder. Amendment.

13. No action shall be defeated by reason of the misjoinder of parties, and the Court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a judge to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly

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joined be struck out, and that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent thereto. All parties whose names are so added as defendants shall be served with summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against them shall be deemed to have begun only on the service of such summons or notice.

Plaintiff: Next friend. Consent.

Defendant:

In *De Hart* v. *Stevenson*, 1 Q. B. D. 313, one part-owner of a ship sued for freight, on behalf of himself and his co-owners. The defendant asked to have the other part-owners added as plaintiffs under this rule, in order to have the benefit of their liability for costs. The Court refused to make the order. The rule, it will be seen, says expressly that a plaintiff is not to be added without his consent. See *Pender* v. *Lushington*, 6 Ch. D. 70, as to consent. The consent need not be in writing: *Cox* v. *James*, 19 Ch. D. 55. p. 134. In *Norris* v. *Beazley*, 2 C. P. D. 80, the defendant, sued upon a bill of exchange, sought to add a company as defendants, on the ground that he was a trustee for the company in the transaction in question, and that the company had cross claims against the plaintiff in respect of the same transactions. The Court refused the application; but were careful not to lay down the rule that a defendant could never be added at the instance of a defendant. See also *Harry* v. *Davey*, 2 Ch. D. 721, V.-C. B. In an action by lessor against lessee to recover the demised premises, on the ground of a forfeiture, the Court refused to allow a mortgagee of the lessee to come in and be made a party under this rule: *Mills* v. *Griffiths*, 45 L. J. Q. B. 771. In *Kino* v. *Rudkin*, 6 Ch. D. 160, a person to whom the defendant had assigned his interest pending suit was added as a defendant by order made at the trial. As to bankruptcy of some of several defendants jointly and severally liable to plaintiff, see *Lloyd* v. *Dimmack*, 7 Ch. D. 398. As to the bankruptcy of a sole defendant, see *Barter* v. *Dubeux*, 7 Q. B. D. 413, C. A. In *Secar* v. *Lawson*, 16 Ch. D. 121, C. A., a trustee in bankruptcy commenced an action, and then assigned his interest pending suit. The assignee was ordered to amend the title of the action, and to introduce such averments into the statement of claim as would disclose his title. In *Ashley* v. *Taylor*, 10 Ch. D. 768, an action was brought against three defendants for a conspiracy to defraud; one died intestate during suit. The plaintiff amended his claim by alleging that the estate of the intestate had benefited by the fraud, and under this rule the administrator was added as a defendant. In *Hunter* v. *Young*, 4 Ex. D. 256, C. A., the estate of a testator had been distributed, and an unpaid creditor sued the residuary legatee. The defendant demurred on the ground that the executor was not joined. The demurrer was overruled, and it was pointed out that the executor might, if necessary, be brought in under r. 17 of this order.

It is clear that whoever might originally have been made a

Order XVI. rr. 13, 14.

party under the earlier rules of this Order may be added under this rule, subject to such terms as the Court may think just: *Honduras Ry. Co.* v. *Lefevre*, 2 Ex. D. 301, C. A.; *Edwards* v. *Lowther*, 45 L. J. C. P. 417; 24 W. R. 434.

Fresh parties cannot be added after final judgment. Thus where a perpetual injunction respecting sewage was made against a municipal corporation and its operation suspended for five years, and in the meantime a local board has succeeded to the rights and liabilities of the corporation, the Court has no power to make the local board parties to the action for the injunction: *Att.-General* v. *Corporation of Birmingham*, 15 Ch. D. 423, C. A.

In *New Westminster Brewery Co.* v. *Hannah*, W. N. 1877, p. 35, C. A., the plaintiffs brought their action and made their case, and the decision was against them. The Court refused to allow them to add fresh plaintiffs for the purpose of setting up a new and inconsistent case.

A defendant, improperly made so, may be struck out at his own instance, though he has delivered a statement of defence: *Vallance* v. *Birmingham Land Corporation*, 2 Ch. D. 369, V.-C. M. Under an order for striking out one defendant and giving general leave to amend, the plaintiff may not strike out the name of another defendant: *Wymer* v. *Dodds*, 11 Ch. D. 436. Where in an action against a corporation, one of its officers was made a defendant merely for purposes of discovery his name was ordered to be struck out under this rule: *Wilson* v. *Church*, 9 Ch. D. 552, M. R.

See further note to rule 2.

The practice of citing to see proceedings in Probate actions is not abolished by this rule: *Kennaway* v. *Kennaway*, 1 P. D. 148.

With respect to the right of a defendant to bring in new parties as parties to a counterclaim, see O. XIX., r. 3, *post*, p. 249, and note thereto.

With respect to the defendant's right to bring in third parties, not for the purpose of obtaining present relief against them, but of binding them by the judgment in the action, see rr. 17, *et seq.*, of this Order, *infra*, and note thereto.

With respect to the addition of parties, when rendered necessary by death, marriage, or devolution of estate, or other like cause, see O. L., *post*, p. 385.

The practice under this rule has superseded pleas in abatement: O. XIX., r. 13, *post*, p. 256; and also it seems the old Chancery practice of demurring for want of parties: *Werdermann* v. *Société Generale d'Electricité*, 19 Ch. D. 246, C. A.

R. 14.

Amendment how and when made.

14. Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court or a judge at any time before trial by motion or summons, or at the trial of the action in a summary manner.

This is in accordance with the practice of the Common Law Courts. In Chancery it takes the place of the common order to amend, but allows much greater freedom of amendment than could have been had under that order.

The application is not to be made ex parte: *Tildesley* v. *Harper*, 8 Ch. D. 277, V.-C. H., but see O. L. r. 4 as to cases under that order. It should usually be made by summons at chambers: *Wilson* v. *Church*, 9 Ch. D. 552.

15. Where a defendant is added, unless otherwise ordered by the Court or judge, the plaintiff shall file an amended copy of and sue out a writ of summons, and serve such new defendant with such writ or notice in lieu of service thereof in the same manner as original defendants are served. R. 15. Amendment of writ and service.

As to the amendment of the writ in general, see O. XXVII., r. 11, *post*, p. 278, and note thereto. As to notice in lieu of service, see O. XI., r. 5, and note thereto, *ante*, p. 210.

As to consolidated action, see *Re Wortley*, 4 Ch. D. 181.

16. If a statement of claim has been delivered previously to such defendant being added, the same shall, unless otherwise ordered by the Court or judge, be amended in such manner as the making such new defendant a party shall render desirable, and a copy of such amended statement of claim shall be delivered to such new defendant at the time when he is served with the writ of summons or notice or afterwards, within four days after his appearance. R. 16. Amendment and service of statement of claim.

17. Where a defendant is or claims to be entitled to contribution or indemnity, or any other remedy or relief over against any other person, or where from any other cause it appears to the Court or a judge that a question in the action should be determined not only as between the plaintiff and defendant, but as between the plaintiff, defendant, and any other person, or between any or either of them, the Court or a judge may, on notice being given to such last-mentioned person, make such order as may be proper for having the question so determined. R. 17. Power to determine questions as against third parties.

The powers of adding parties given by the previous rules of this Order are given for the purpose of securing that the original action shall be properly constituted; that the persons claiming relief, jointly, severally, or in the alternative, shall be before the Court as plaintiffs; and those against whom relief is claimed, jointly, severally, or in the alternative, as defendants.

Third parties.

But s. 24, sub-s. 3 of the Act of 1873, *ante*, p. 20, enacts, that the Court may give relief "relating to or connected with the original subject of the cause or matter . . . . . , claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any Rule of Court or any order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant." The terms of this section are very wide, wide enough to give the defendant a right to substantial relief against any person whatever, provided only it be

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connected with the original subject matter. But the rules have not been so framed as to give a party proceeding under them the full benefit of the section: See per Mellish, L. J., in *Treleaven* v. *Bray*, 45 L. J. Ch. 113, C. A. Under the rules, a defendant can bring in a third party in but two ways:—

First, he may make him defendant to a counterclaim; but only as co-defendant with the original plaintiff: see O. XIX., r. 3, *post*, p. 249.

Secondly, under this and the four following rules he may bring in third parties in cases in which questions arise in an action which it is important to have conclusively settled, not only as between the plaintiff and defendant, between whom they originally arise, but also between other persons. The object, however, in that case is not to enable a defendant to obtain any actual present relief against the third person, but only to secure a binding decision, with a view to future relief. *Treleaven* v. *Bray*, *ubi supra*; see *Padwick* v. *Scott*, 2 Ch. D. 736, V.-C. H.; *The Cartsburn*, 5 P. D. 59, C. A. As to subsequent proceedings between the defendant and the third party, see *ibid.* at p. 62, per James, L. J. Where, however, the person against whom relief is sought under this rule is a co-defendant, it seems the whole matter may in appropriate cases be worked out in the same action. Thus in an action against trustees for breach of trust, one trustee claimed contribution from his co-trustee as being primarily liable for the breach of trust. A decree for an account and payment having been made against the trustees, it was held on further consideration that the trustee claiming contribution was entitled to an enquiry as between himself and his co-trustee how and in what proportions the sums ordered to be paid to the *cestui que trust* should be borne and paid: *Butler* v. *Butler*, 14 Ch. D. 329; see the form of the decree at p. 334.

Two cases are mentioned in rule 17:—

1st. Where a defendant claims to be entitled to contribution, indemnity, or other remedy or relief over against any other person.

In such cases it is obviously desirable, on the one hand, that the question of the defendant's liability to the plaintiff should be finally settled once for all, so that the decision should be binding as against the person from whom he seeks relief over. On the other hand, it is equally obvious that such person ought to have an opportunity of intervening in the action, and resisting the decision which is to bind him.

Three examples of this kind are given in form No. 1, Appendix (B) to the Act of 1875, *post*, p. 474. The first is the case of an action against a surety, who claims contribution from another person as co-surety. The second, an action against the acceptor of a bill of exchange, who claims to be indemnified by another person on the ground that the bill was accepted for his accommodation. The third, an action on a contract of sale, in which the defendant claims to be indemnified by another on the ground that he made the contract as his agent. See *Ex parte Smith*, 2 Ch. D. 51, C. A., and see further *Central African Trading Co.* v. *Grove*, 40 L. T. 540, C. A.

2nd. The second case is where from any other cause it appears to the Court or a Judge that a question in the action should be determined, not only as between the plaintiff and defendant, but as between the plaintiff and defendant and any other person, or between any or either of them.

In order to justify an order for bringing in a third party under

this rule, it is not necessary that such third party be interested in the whole subject matter of the plaintiff's action against the defendant. It is enough to show any substantial question arising in the action which it is desirable to have decided also as between the defendant and the third party: *Swansea Shipping Co.* v. *Duncan*, 1 Q. B. D. 644, C. A. Thus, where the action was against charterers for not unloading according to the custom of the port of discharge, the defendants were allowed to bring in persons to whom they had sold the cargo under terms which bound them to take delivery according to the custom of the port; in order to bind them by the decision of the one question whether the ship was or was not discharged as fast as the custom of the port required: *Ibid.* So, in an action for not accepting goods, the defence being raised, amongst others, that the goods were not according to contract, the defendants were allowed to bring in the persons to whom they had re-sold on the same terms, in order to bind them by the decision as to the quality of the goods: *Beneke* v. *Frost*, 1 Q. B. D. 419.

Discretion.

But the exercise of the power is discretionary, and the Court will not bring in the third party if the plaintiff would be prejudiced thereby in the prosecution of his action: *Bower* v. *Hartley*, 1 Q. B. D. 652, C. A. See, for example, *Associated Home Co.* v. *Whichcord*, 8 Ch. D. 457; *Wye Valley Railway Co.* v. *Hawes*, 16 Ch. D. 489, C. A., where leave to serve third party notices was refused on this ground.

In *Horwell* v. *London General Omnibus Co.*, L. R. 2 Ex. D. 365, C. A., the action was for injuries alleged to have been caused by the negligence of the defendants' servants. The defendants sought to bring in the London Tramways Co., on the ground that the mischief was caused by the negligence of its servants, not of the defendants'. The Court of Appeal, overruling the Exchequer Division, held that the case was not within the rules. See also *Harry* v. *Davey*, L. R. 2 Ch. D. 721, V.-C. B.

Fourth party.

In *Fowler* v. *Knoop*, 36 L. T. 219; W. N. 1877, p. 68, Ex. D., it was held that a third party brought in, and having had an order giving him liberty to defend the action, under r. 21, *post*, p. 214, may himself bring in a fourth party from whom he claims indemnity on the same ground upon which it is claimed from him. In *Walker* v. *Balfour*, 25 W. R. 511, C. P. D. and *Yorkshire Waggon Co.*, v. *Newport Coal Co.*, 5 Q. B. D. 268, doubts were expressed upon the point. In *Witham* v. *Vane*, 49 L. J. Ch. 242, however, Fry, J., ordered a fourth party to be brought in.

Practice.

Where a defendant wishes to proceed under these rules to bring in a third party, the course is to obtain an order *ex parte*, giving leave to serve a notice on the third party: rr. 17, 18, 19; *Pearson* v. *Lane*, W. N. 1875, p. 248, Quain, J., at Chambers. Although the application is *ex parte* as regards the third party, notice of the application should be given to the plaintiff, who may be prejudicially affected by bringing in the third party, and is therefore entitled to be heard: *Wye Valley Railway Co.* v. *Hawes*, 16 Ch. D. 489, C. A. If the case be one of contribution, indemnity, or other remedy over (and these are the cases in which this procedure is commonly put in force), the form of the notice is given by r. 18, and Form 1, Appendix B., *post*, p. 474. The notice (r. 18) is to be served like a writ of summons; as to which see O. IX., *ante*, p. 200. It may, therefore, be served out of the jurisdiction in the same cases as a writ of summons: *Swansea Shipping Co.* v. *Duncan*, 1 Q. B. D. 644, C. A. The party served may either appear

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or not appear. If he does not appear, the consequence is that he admits the validity of the judgment in the original action : r. 20 ; *Horwell* v. *London General Omnibus Co.*, *ubi supra*. If, on the other hand, he appears, then a second application must be made for an order directing to what extent, if any, the third party is to be bound by the decision of the action, and to what extent he is to be entitled to intervene in the conduct of the action : *Swansea Shipping Co.* v. *Duncan* ; *Beneeke* v. *Frost*, *ubi supra*. Upon this the plaintiff is entitled to be heard, as his interest may be in same cases affected : *Bower* v. *Hartley* ; *Horwell* v. *London General Omnibus Co.* ; *ubi supra*.

Costs.

The question of costs is ordinarily reserved, to be dealt with at or or after the trial. See *Beneeke* v. *Frost*, 1 Q. B. D. 149. See, however, *Beynon* v. *Godden & Co.*, 4 Ex. D. 246, C. A., where a third party appealed from the order bringing him in, and his appeal was dismissed with costs. It was held that the ultimate result could not affect costs so incurred. When the third party has appeared his costs may, in the discretion of the Court, be ordered to be paid by the plaintiff : *Witham* v. *Vane*, 28. W. R. 812 ; or to be paid by the defendant : *Dawson* v. *Shepherd*, 49 L. J. Ex. 529, C. A. ; or to be borne by himself : *Williams* v. *South Eastern Railway*, 26 W. R. 352 ; *Yorkshire Waggon Co.* v. *Newport Coal Co.*, 5 Q. B. D. 268 ; or he may be ordered to pay the plaintiff's costs : *Hornby* v. *Cardwell*, 8 Q. B. D. 329, C. A.

Co-defendants.

Relief by way of counter-claim against a co-defendant is confined to cases where the relief sought is connected with the original cause of action, and the plaintiff is interested in it. Note, too, the language of O. XXII. r. 5. See O. XIX., r. 3, and note thereto, *post*, p. 251, as to counter-claims against co-defendants.

If a defendant claims indemnity against a co-defendant, his proper course is to proceed under r. 17 ; not by way of counter-claim : *Furness* v. *Booth*, 4 Ch. D. 586, M. R. ; notwithstanding a contrary ruling by Hall, V.-C., in the earlier case of *Shepherd* v. *Beane*, L. R. 2 Ch. D. 223 ; since disapproved by the same judge : *Harris* v. *Gamble*, 6 Ch. D. 748.

The form of notice prescribed by the next rule only applies where the party against whom relief is sought is a stranger to the action. No form of notice is provided where the person against whom relief is claimed is a co-defendant ; but usually a copy of the pleadings of the defendants claiming such relief, is ordered to be delivered by way of notice to the co-defendant against whom the relief is sought : *Bagot* v. *Easton*, 11 Ch. D. 392 ; *Marner* v. *Bright*, 11 Ch. D. 394, n., where the form of order is given. A mere delivery of his pleadings by the defendant to his co-defendant, without any order, may be sufficient notice : *Furness* v. *Booth*, 4 Ch. D. 586 ; *Butler* v. *Butler*, 14 Ch. D. 329 ; but a purchase by a defendant of the pleadings of a co-defendant who claims contribution or indemnity from him, does not operate as notice to the former : *Steel* v *Dixon*, 28 W. R. 796.

Discovery.

As to discovery by or from third parties, see O. XXXI., rr. 1, 11, *post*, p. 291, 297.

R. 18.

Notice to third party.

18. Where a defendant claims to be entitled to contribution, indemnity, or other remedy or relief over against any person not a party to the action, he may, by leave of the Court or a judge, issue a notice to that effect, stamped with the seal with which writs of summons are sealed. A copy of such notice shall be filed with the proper officer

and served on such person according to the rules relating to the service of writs of summons. The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the Court or a judge, be served within the time limited for delivering his statement of defence. Such notice may be in the form or to the effect of the Form No. 1 in the Appendix (B) hereto, with such variations as circumstances may require, and therewith shall be served a copy of the statement of claim, or if there be no statement of claim, then a copy of the writ of summons in the action. Service. Form.

For the form here referred to, see *post* p. 474. See note to last rule.

19. When under Rule 17 of this order it is made to appear to the Court or a judge at any time before or at the trial that a question in the action should be determined, not only as between the plaintiff and defendant, but as between the plaintiff and the defendant and any other person, or between any or either of them, the Court or a judge, before or at the time of making the order for having such question determined, shall direct such notice to be given by the plaintiff at such time and to such person and in such manner as may be thought proper, and if made at the trial the judge may postpone such trial as he may think fit. R. 19. Court may direct notice to be given.

See note to r. 17, *ante*, p. 237.

20. If a person not a party to the action, who is served as mentioned in Rule 18, desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, he must enter an appearance in the action within eight days from the service of the notice. In default of his so doing, he shall be deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise. Provided always, that a person so served and failing to appear within the said period of eight days may apply to the Court or a judge for leave to appear, and such leave may be given upon such terms, if any, as the Court or a judge shall think fit. R. 20. Appearance by third party. Default.

As to appearance, see O. XII., *ante*, p. 210.

21. If a person not a party to the action served under these rules appears pursuant to the notice, the party giving the notice may apply to the Court or a judge for R. 21. Direction as to mode of determining

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question in action.

directions as to the mode of having the question in the action determined; and the Court or a judge, upon the hearing of such application, may, if it shall appear desirable so to do, give the person so served liberty to defend the action upon such terms as shall seem just, and may direct such pleadings to be delivered, or such amendments in any pleadings to be made, and generally may direct such proceedings to be taken, and give such directions as to the Court or a judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the person so served shall be bound or made liable by the decision of the question.

Under this rule when the third party has appeared, the plaintiff may get discovery of documents from him as if he were a defendant: *Macallister* v. *Bishop of Rochester*, 5 C. P. D. 194. In *Witham* v. *Vane*, 49 L. J. Ch. 242, the third party was allowed to put in a statement of defence to those portions of the statement of claim which were not covered by the defendant's defence. As to withholding directions, see *Schneider* v. *Batt*, 42 L. T. 142; as to dismissing the third party, see *Schneider* v. *Batt*, 8 Q. B. D. 701, C. A. See note to r. 17, *ante*, p. 237.

Order XVII.

ORDER XVII.

JOINDER OF CAUSES OF ACTION.

R. 1.

When allowed.

'1. Subject to the following rules, the plaintiff may unite in the same action and in the same statement of claim several causes of action, but if it appear to the Court or a judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or a judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof.

Before the Judicature Acts two methods of limiting the scope of an action were in use; one in the Common Law Courts, the other in the Court of Chancery. At Common Law the matter was affected by rules of a highly technical character, relating to forms of action. The C. L. P. Act, 1852, s. 41, authorised the joinder of any causes of action in one action, except replevin and ejectment. The restriction that remained was this; all the relief claimed in any action must be claimed by and against the same parties, and in the same rights. This Common Law doctrine as to parties is swept away by the earlier rules of O. XVI., *ante*, p. 226. The Court of Chancery adopted a system of limitation founded upon consideration of the subject matter. It forbade multifariousness,

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that is, the introduction of separate and distinct objects into one suit. This principle is, in terms, abolished by the present rule: *Cox* v. *Barker*, 3 Ch. D. 359, C. A.

Joinder of causes of action.

If, then, the Common Law mode of limitation by reference to parties, and the Chancery mode of limitation by reference to subject matter be both gone, is there any restriction left, other than the discretion given to the Court under rr. 1, 8 and 9 of this Order? Or, subject to that discretion, may any number of persons as plaintiffs sue any number of persons as defendants; and then set up in the action any claims, however unconnected with one another, which any of the plaintiffs can make against any of the defendants? The question is not free from difficulty. But its solution may, perhaps, be facilitated by construing the various rules bearing upon the question with careful reference to the subject matter with which they purport to deal, and the context in which they occur. O. XVI. deals with parties to actions, not with the subject matter of actions. It presupposes an action about to be instituted in the manner directed by earlier orders. It presupposes, therefore, a cause of action, that is to say, a set of facts which give or may give to some one a right to legal relief against some one else. And the order proceeds to say: (r. 1) that all persons may be joined as plaintiffs who claim *relief* jointly, severally, or in the alternative; and (r. 3), all persons may be made defendants against whom any *relief* is claimed, jointly, severally, or in the alternative. R. 4 of that order, it is true, says that the defendants need not all be interested as to all the relief prayed, *or every cause of action included* in the action. But the words "cause of action" have been used in more senses than one, and the sense must often be gathered from the context. Sometimes they mean a fact; but sometimes also a legal relation arising from that fact. Thus, in *Child* v. *Stenning*, cited below, the fact giving a right of action against either defendant was the same, viz., the entry upon the plaintiff's land. But the causes of action were different; against one it was trespass, against the other breach of contract. Having regard to the context, "cause of action" in the rule in question is perhaps used in the latter sense. If this be so then, as far as O. XVI. is concerned, there seems to be no question of bringing several transactions into the action, but only of bringing parties in, with reference to their right or liability to relief by reason of a given set of facts. Thus, a libel is published, reflecting upon eight people. This gives each of the eight a right to relief, though not necessarily the same relief. Therefore they may all be plaintiffs: *Booth* v. *Briscoe*, 2 Q. B. D. 496. Two firms connected in business write trade libels concerning the plaintiff to each other. Each firms circulates the letters of the other. They may both be made defendants: *Desilla* v. *Sohunks & Co.*, W. N. 1880, p. 96, C. P. D. A contract is made and broken. This gives a right to relief against the principal for whom it was made, if the agent was authorised to make it; against the agent, if he was not. Therefore both may be made defendants: *Honduras Ry. Co.* v. *Lefevre*, 2 Ex. D. 301. A trespass is committed. This gives a right to relief against the trespasser, or against the person who has covenanted for quiet enjoyment, according as the fact may turn out. Both may be made defendants: *Child* v. *Stenning*, 5 Ch. D. 695, C. A. A bill of exchange is dishonoured. The holder is entitled to relief against acceptor, drawer, and indorser, and may therefore join them as defendants: O. XVI., r. 5, *ante*, p. 230.

Order XVII. rr. 1, 2.

Order XVII. purports to deal with an entirely different subject. It has to do, not with the selection of parties, but with the introduction of subject matters into an action; and in this order alone, it would seem, we must look for authority to combine different subject matters in one action. Accordingly, the phraseology is changed. The rules no longer speak of "relief," but of "causes of action" or "claims." And, this rule being taken with slight modification from s. 41 of the C. L. P. Act, 1852, the words "cause of action" ought to receive the same construction that they received in that section: see *Bustros* v. *White*, 1 Q. B. D. 423. That is to say, the rule must be taken to include not only different legal relations arising out of the same transaction, but separate and independent transactions. Then r. 1 says that "the plaintiff may unite in the same action several causes of action." So far as concerns plaintiffs, in the several causes of action, this rule seems clearly to contemplate identity of parties. As to defendants, nothing is expressed. But "causes of action," in an order dealing not with parties but with subject matters, may well be read "causes of action between the same parties." And this view is strengthened by the fact that the following rules go on to provide expressly for cases in which claims not strictly between the same parties, or between the same parties but not in the same right, may be joined. In one instance, that of joint and several claims by plaintiffs, they are expressly limited to those against the same defendant (r. 6).

The reasoning may be summed up thus. O. XVI., dealing with parties, assumes an ascertained subject matter. O. XVII., dealing with subject matters, assumes ascertained parties. There must, therefore, be either identity of subject matter, in which case O. XVI. gives ample liberty in the choice of parties; or identity of parties, in which case O. XVII. gives a like liberty in the choice of subject matters. See this passage cited and approved in *Smith* v. *Richardson*, 4 C. P. D. at 116. In that case the purchaser of goods gave a bill for the prices, which was dishonoured. The vendor of the goods and the holder of the bill both sued the purchaser in one action, one claiming for the price, the other claiming on the bill. The claim was held embarrassing.

It is clear that under this rule a plaintiff may join two separate alternative causes of action against the same defendant: *Bagot* v. *Easton*, 7 Ch. D. 1, C. A.

As to the hearing where alternative relief is claimed, see *Child* v. *Stenning*, 7 Ch. D. 413. A claim for inconsistent alternative relief by different plaintiffs, will be disallowed as embarrassing: *Smith* v. *Richardson*, 4 C. P. D. 112.

No practical difficulty has ever been found to arise from the power of joinder given by the C. L. P. Act. Plaintiffs have too much regard for their own interest to confuse their cases by an inconvenient combination of claims.

As to the mode of pleading several distinct causes of action, see O. XIX., r. 9, *post*, p. 255.

R. 2.

Action for land.

2. No cause of action shall, unless by leave of the Court or a judge, be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held.

Formerly no claim could be joined with a claim for possession in ejectment, except a claim for mesne profits in the case of landlord against tenant.

An action for foreclosure is not an action for the recovery of land within the meaning of this rule: *Tawell* v. *Slate Company*, 3 Ch. D. 629, M. R.; but see *Harlock* v. *Ashberry*, 19 Ch. D. 539, C. A., which, however, was not a case on this rule. Nor is an action to establish title to land not claiming possession of it: *Gledhill* v. *Hunter*, 14 Ch. D. 492, M.R., declining to follow *Whetstone* v. *Dewis*, 1 Ch. D. 99, V.-C. H.

Leave will be given to join with an action for recovery of land a claim to recover a deed relating to the land, or to recover personal estate comprised in the same instrument with the land: *Cook* v. *Enchmarch*, 2 Ch. D. 111, M. R. So, leave has been given to join a claim for a receiver: *Allen* v. *Kennet*, 24 W. R. 845. M. R.; and to join a claim for administration, where the plaintiff was both heir at law and one of the next of kin of an intestate: *Kitching* v. *Kitching*, 24 W. R. 901, M. R. See also *Manisty* v. *Kenealy*, 24 W. R. 918; *Kendrick* v. *Roberts*, 30 W. R. 365.

And where the writ was indorsed for declaration of title, declaration that a lease was granted under a mistake, recovery of rents and a receiver, and the statement of claim further asked for possession, it was held that the whole claim was an action for the recovery of land merely, and that there was no joinder of any cause of action which required the leave of the Court: *Gledhill* v. *Hunter*, 14 Ch. D. 492.

Leave to join causes of action under this rule must be applied for before the writ is issued: *Re Pilcher*, 11 Ch. D. 905, C. A.; but see *Musgrave* v. *Stevens*, W. N. 1881, p. 163, C. A.

This rule applies to counter claims: *Compton* v. *Preston*, W. N. 1882, p. 58.

R. 3. Trustee in Bankruptcy.

3. Claims by a trustee in bankruptcy as such shall not, unless by leave of the Court or a judge, be joined with any claim by him in any other capacity.

R. 4. Husband and wife.

4. Claims by or against husband and wife may be joined with claims by or against either of them separately.

In the Common Law Courts, before the Judicature Acts, this could not be done, except to the limited extent authorised by s. 40 of the C. L. P. Act, 1852, by which in an action brought by a man and his wife for an injury done to the wife, where she was necessarily joined as co-plaintiff, the husband might add claims in his own right.

R. 5. Executor or administrator.

5. Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator.

Whether an executor, on the one hand, ought to sue, and on the other hand, ought to be sued, as such, or in his personal capacity, sometimes turns upon very fine distinctions. See *Ashby* v. *Ashby*, 7 B. & C. 444; *Corner* v. *Shew*, 3 M. & W. 350; *Bolingbroke* v. *Kerr*, L. R. 1 Ex. 222; *Moseley* v. *Rendell*, L. R. 6 Q. B. 338; *Abbott* v. *Parffitt*, *Ibid.* 346. Great inconvenience occasionally

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arose from inability to join in the Common Law Courts claims by or against an executor in his personal and in his representative character. This rule removes the difficulty. See per Hall, V.-C., in *Padwick* v. *Scott*, 2 Ch. D. 736, at p. 243.

This rule, it seems, does not apply to counter-claims: *Macdonald* v. *Carrington*, 4 C. P. D. 28.

R. 6. Joint and several claims.

6. Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant.

See note to r. 1, and *Johnson* v. *Burgess*, 47 L. J. Ch. 552.

R. 7. Power to order separate trial.

7. The last three preceding rules shall be subject to Rule 1 of this Order, and to the Rules hereinafter contained.

See note to the next rule.

R. 8. Application to strike out.

8. Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of in one action, may at any time apply to the Court or a judge for an order confining the action to such of the causes of action as may be conveniently disposed of in one proceeding.

Rule 1 of this order gives power to "order separate trials of any of such causes of action, or make such other order as may be necessary or expedient for the separate disposal thereof." This and the next rule speak of an order "confining the action to such of the causes of action as may be conveniently disposed of in one proceeding," and ordering other causes of action "to be excluded." If these latter rules are to be construed strictly it seems probable that, except in some very extreme case, the former and less stringent power will be exercised, rather than the latter and more stringent. Possibly, however, the first rule (which, it may be observed, is taken from the original schedule to the Act of 1873) may be regarded as the governing rule; and the latter rules may be read as merely providing the machinery for giving effect to it. If so, an order confining the action may perhaps be read as meaning no more than an order under Rule 1; and the order for amending the proceedings mentioned in Rule 9 may be little more than an order for separate records, under s. 41 of the C. L. P. Act, 1852.

R. 9. Order to strike out pleadings.

9. If, on the hearing of such application as in the last preceding Rule mentioned, it shall appear to the Court or a judge that the causes of action are such as cannot all be conveniently disposed of in one action, the Court or a judge may order any of such causes of action to be excluded, and may direct the statement of claim, or, if no statement of claim has been delivered, the copy of the writ of summons, and the indorsement of claim on the

writ of summons, to be amended accordingly, and may make such order as to costs as may be just. Order XVII. r. 9.

See *Smith* v. *Richardson*, 4 C. P. D. 112. See also O. XXVII., r. 1, *post*, p. 274, and note thereto.

ORDER XVIII. Order XVIII.

Actions by and against Lunatics and Persons of Unsound Mind.

In all cases in which lunatics and persons of unsound mind not so found by inquisition might respectively before the passing of the Act have sued as plaintiffs or would have been liable to be sued as defendants in any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend in manner practised in the Court of Chancery before the passing of the said Act, and may in like manner defend any action by their committees or guardians appointed for that purpose. Insane person.

In the Common Law Courts lunatics sued and were sued in person or by attorney: 2 Chitty's Archbold, p. 1267, ed. 12. Idiots appeared in person, and a next friend was then allowed to intervene: *Ibid.*

In Chancery, lunatics sued by the committee of the estate, or, if there was none, by next friend. The committee was a necessary party to a suit affecting that estate, and he also defended for the lunatic. A person of unsound mind, not so found, sued by his next friend. If made defendant, he entered an appearance, and then a guardian *ad litem* was appointed, as of course, on his own application. If he failed to apply, the plaintiff might move for such appointment to be made: Dan. Ch. Pr. pp. 80, 158, ed. 5.

See O. XVI., r. 12a, *ante*, p. 234, as to service of notices of judgments or orders on persons of unsound mind.

As to the inspection and production of documents relating to the estate of a lunatic which are in the hands of the Registrar, see *Re Smyth*, 15 Ch. D. 286, C. A.; and 16 Ch. D. 673, C. A. See too *Re Campbell*, 13 Ch. D. 323, C. A.

Order XIX.

ORDER XIX.

PLEADING GENERALLY.

R. 1. Old rules abolished.

1. The following rules of pleading shall be substituted for those heretofore used in the High Court of Chancery and in the Courts of Common Law, Admiralty, and Probate.

By s. 100 of the Act of 1873, *ante*, p. 92, with which the Act of 1875, scheduling these rules, is incorporated, "pleading" includes "any petition or summons;" and also "the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counter claim of a defendant," and by the same section "rules of court" include "forms."

This order deals with the contents of pleadings generally. Mode of service and procedure in relation to pleadings are dealt with by subsequent orders.

R. 2. Pleading: Claim. Defence. Reply. Costs of prolixity.

2. Unless the defendant in an action at the time of his appearance shall state that he does not require the delivery of a statement of complaint, the plaintiff shall, within such time and in such manner as hereinafter prescribed, deliver to the defendant after his appearance a statement of his complaint and of the relief or remedy to which he claims to be entitled. The defendant shall, within such time and in such manner as hereinafter prescribed, deliver to the plaintiff a statement of his defence, set-off, or counter-claim (if any), and the plaintiff shall in like manner deliver a statement of his reply (if any) to such defence, set-off, or counter-claim. Such statements shall be as brief as the nature of the case will admit, and the Court in adjusting the costs of the action shall inquire, at the instance of any party, into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same.

For the form of a Memorandum of Appearance, see Appendix (A), Part 1. No. 6, *post*, p. 660. As to delivery of pleadings, see r. 7 of this order, *post*, p. 254. For time for delivering claim, see O. XXI., *post*, p. 264. For time for delivering defence, see O. XXII., *post*, p. 267. As to counter-claims, see the next rule, and O. XXII., rr. 5 to 10, *post*, p. 268. For time for reply, see O. XXIV., *post*, p. 273.

As to the effect of the defendant, at the time of appearance, dispensing with a statement of claim, see O. XXII., r. 2, *post*, p. 267, and note thereto.

The plaintiff's right of reply is general. He is not limited to a mere traverse; but may traverse, or confess and avoid, or both:

Hall v. *Eee*, 4 Ch. D. 341, C. A.; overruling *Earp* v. *Henderson*, 3 Ch. D. 254, V.-C. B. See *Breslauer* v. *Barwick*, 24 W. R. 901, C. P. D.

The question of undue prolixity may be inquired into by the taxing officer, in the absence of any order of the Court or Judge: R. S. C. (Costs), *post*, p. 466, r. 18; and either with or without the application of any party: *Ibid.*

This does not, however, take away the power of striking out any part of a pleading on the ground of excessive prolixity: *Marsh* v. *Mayor of Pontefract*, W. N., 1876, p. 7, Huddleston, B., at Chambers; *Davy* v. *Garrett*, 7 Ch. D. 473, C. A.

See s. 24 of the Act of 1873, *ante*, p. 18, which lays down what rights the Courts are to recognise, and what relief plaintiffs and defendants respectively are entitled to.

R. 3. Set-off and counter-claim.

3. A defendant in an action may set off, or set up, by way of counter-claim against the claims of the plaintiff, any right of claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or a judge may, on the application of the plaintiff before trial, if in the opinion of the Court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.

By sec. 24, sub-s. 3, of the Act of 1873, *ante*, p. 20:

[The said Courts respectively, and every judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of Court, or any order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for

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the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant.]

Set-off and counter-claim.

By O. XXII., r. 10, *post*, p. 270:

"Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case."

The section and rules above set out introduce changes of the most important kind—

Subject matter.

First, in the case of pecuniary claims, the power of set-off is no longer, as was formerly the case, limited to debts. Claims for unliquidated damages may for the future be set off or set up against debts, and debts against damages, and damages against damages. Thus in *Lees* v. *Patterson*, 7 Ch. D. 866, which was an action for an account, the defendant was allowed to counterclaim for damages for arrest under a writ of *ne exeat regno* improperly obtained; and in *Besant* v. *Wood*, 12 Ch. D. 605, an action by a husband to enforce a separation deed was met by a counterclaim for a judicial separation. As to a counter-claim in an Admiralty action for limitation of liability under the Merchant Shipping Act, 1862, see *The Clutha*, 35 L. T. 36. A set-off, or a counter-claim, can only be of matters for which an action would lie. Therefore, a debt alleged to have been incurred by an infant, and not ratified under Lord Tenterden's Act, could not be set off: *Rawley* v. *Rawley*, 1 Q. B. D. 460. So in an action by an administrator for a balance due to the intestate, it was sought to set up in answer a promissory note on which the intestate was liable, but which matured after his death, and an order had been made, in the Chancery Division, for the administration of the intestate's estate. It was held, that the matter relied upon was not good as a set-off, because not within the Statutes of Set-Off; nor as a counter-claim, because, before the Judicature Act, the Court of Chancery would have restrained an action in respect of it: *Newell* v. *National Provincial Bank*, 1 C. P. D. 496. And where a defendant had obtained judgment as plaintiff in another action which was not to be enforced without the leave of a judge of the Chancery Division, he was not allowed to counterclaim for that leave as he could not have sued for it: *Birmingham Estates Co.* v. *Smith*, 13 Ch. D. 506, M. R.; see, too, *Gathercole* v. *Smith*, 17 Ch. D. 1, at p. 4, M. R.

Extent.

Secondly, a cross claim by a defendant may not merely be used by way of set-off, as an answer to the plaintiff's claim; a defendant may, by way of counter-claim, claim in the original action any relief against the plaintiff which he could formerly have sought by a cross action at law, or suit in equity: so that there may be a judgment in his favour for a sum of money, if the balance of pecuniary claim prove to be in his favour; or any other remedy or relief may be adjudged to him to which he may show himself to be entitled. It is no objection to the right to set up a counter-claim that it will not equal in amount the claim of the plaintiff: *Mostyn* v. *West Mostyn Co.*, 1 C. P. D. 145. Where two plaintiffs jointly sue a defendant, he may, by way of counter-claim, set up claims which he alleges that he has against the two plaintiffs severally: *Manchester, Sheffield and Lincolnshire Ry.* v. *Brooks*, 2 Ex. D. 243. Where a debtor is sued by the assignee of a chose

in action he may counterclaim for damages for breach of contract by the assignor, provided claim and counter-claim relate to the same matter, but in such cases the amount recoverable under the counter-claim must be limited to the amount of the claim: *Young* v. *Kitchen*, 3 Ex. D. 127; but see *Pallas* v. *Neptune Marine Insurance Co.*, 5 C. P. D. 34, C. A., where, however, the case turned on the true construction to be put on the Policies of Marine Assurance Act, 1868.

New parties or co-defendants.

Thirdly, not only may relief be sought against the plaintiff by way of counter-claim, but also relief relating to or connected with the original subject matter of the action may be sought against any other person, whether already a party to the action or not. Where, however, it is sought to bring in a third party as defendant to a counter-claim, or to charge a co-defendant by means of a counter-claim, two conditions must be complied with: First, by the express terms of the sub-section above cited, the relief sought by way of counter-claim must relate to, or be connected with, the original subject of the action: *Padwick* v. *Scott*, 2 Ch. D. 736, V.-C. H.; *Barber* v. *Blaiberg*, 19 Ch. D. 475. Secondly, by reason of the construction put upon the Act and rules relief cannot be sought by way of counter-claim either against a co-defendant, or against a third party, in which the plaintiff is not interested: *Trelcaven* v. *Bray*, 1 Ch. D. 176; 45 L. J. Ch. 113, C. A.; *Furness* v. *Booth*, 4 Ch. D. 586, M. R.; *Warner* v. *Twining*, 24 W. R. 536, M. R.; *Dear* v. *Sworder*, 4 Ch. D. 476, V.-C. H.; *Harris* v. *Gamble*, 6 Ch. D. 748, V.-C. H.; *McLay* v. *Sharp*, W. N. 1877, p. 216, M. R. But if these conditions be complied with, it is immaterial that the third party brought in as defendant to the counter-claim could not have joined as a plaintiff in the original claim: *Turner* v. *Hednesford Gas Co.*, 3 Ex. D. 145, C. A. In *Evans* v. *Buck*, L. R. 4 Ch. D. 432, Jessel, M. R., held that a person could not be brought in as defendant to a counter-claim against whom there would be a right to relief only in one of two inconsistent alternatives. See, however, the cases cited in the note to O. XVI., r. 3, *ante*, p. 228. The defendant cannot counterclaim for relief either against the plaintiff or a third party in the alternative: *Central African Trading Co.* v. *Grove*, 48 L. J. Ex. 510, C. A. A third party so brought in cannot counter-claim against the defendant who brought him in: *Street* v. *Gover*, 2 Q. B. D. 498.

Discretion.

The Court in the exercise of its discretion may disallow a set-off or counter-claim which cannot be conveniently disposed of in the pending action. Under this rule the plaintiff who wishes to have a counter-claim disallowed is directed to apply "before trial;" while under O. XXII., r. 9, *post*, p. 269, he is directed to apply "before reply." The effect of this discrepancy is not clear. An appeal lies from the exercise of this discretion, but will only be allowed in a very strong case: *Huggons* v. *Tweed*, 10 Ch. D. 359, C. A., at 363. For examples of counter-claims which in the discretion of the Court have been allowed or disallowed, see O. XXII., r. 9, *post*, p. 269, and note thereto.

How far a cross-action.

How far a counter-claim is to be regarded as an integral part of the original action, and how far it is to be regarded as a wholly independent proceeding which for convenience is tried with the original action, is not clear. In *Varasseur* v. *Krupp*, 15 Ch. D. 474, M. R., it was held that when the plaintiff discontinued the defendant could not continue on his counter-claim; in *Green* v. *Sevin*, 13 Ch. D. 589, it was held that where the issues in claim and counter-claim were the same, the plaintiff could not adduce

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fresh evidence in reply on the counter-claim; in *Macdonald* v *Carrington*, 4 C. P. D. 28, it was held that in a counter-claim claims against an executor in his representative capacity could not be joined with claims against him personally, though this could be done by a plaintiff; and in *Original Hartlepool Collieries Co.* v. *Gibb*, 5 Ch. D. 713, M. R., it was held that relief by counter-claim could only be sought in respect of causes of action which accrued prior to the issue of the writ, but in two cases Fry, J., has allowed a counter-claim to be pleaded in respect of a cause of action which accrued after action brought: *Lees* v. *Patterson*, 7 Ch. D. 866; *Beddall* v. *Maitland*, 17 Ch. D. 174. In *Ellis* v. *Munson*, 35 L. T. 585, the Court of Appeal held that a counter-claim which was of the nature of a pecuniary set-off, arising after action brought, might be pleaded in the form given by O. XX., *post*, p. 263. When pleaded in this form the plaintiff has an opportunity of confessing the defence and getting his costs. In *Winterfield* v. *Bradnum*, 3 Q. B. D. 326, C. A., where the question at issue was security for costs; and in *Baines* v. *Bromley*, 6 Q. B. D. 695, C. A., where the question at issue was the taxation of costs, there are strong dicta to the effect that a counter-claim is to be regarded as an independent action. As to the distinction between set-off and counter-claim, see *Gathercole* v. *Smith*, 7 Q. B. D. 626, C. A.

Counter-claim to counter-claim.

A plaintiff in reply may put in a counter-claim to the defendant's counter-claim arising out of the same matter: *Toke* v. *Andrews*, 8 Q. B. D. 428.

Costs.

As to costs where there is a counter-claim and the original plaintiff recovers less than the sum fixed by the County Courts Act, 1867, see note to s. 67 of the Act of 1873, *ante*, p. 68; as to costs in other cases, see note to O. LV., *post*, p. 405.

With respect to the case in which third parties, other than the original plaintiff and defendant, are to be brought in, not to obtain any present relief against them, but to obtain a decision binding as against them of the original question in the action, see O. XVI., rr. 17 to 21, *ante*, p. 237, and note thereto.

As to pleadings in cases of counter-claims, see rr. 10, 20, of this Order; O. XXII., rr. 5 to 10, *post*, p. 268.

As to excluding a counter-claim when it cannot conveniently be disposed of in the action, see O. XXII., r. 9, *post*, p. 269.

R. 4.

Contents of pleading.

Counsel's signature.

4. Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved, such statement being divided into paragraphs, numbered consecutively, and each paragraph containing, as nearly as may be, a separate allegation. Dates, sums, and numbers shall be expressed in figures and not in words. Signature of counsel shall not be necessary. Forms similar to those in Appendix (C) hereto may be used.

For these forms, see *post*, p. 488, *et seq.*

As to the signature of pleadings, the greatest diversity of practice heretofore prevailed in the various Courts to which the rules of this schedule apply. In the Common Law Courts signature has long been dispensed with. In Chancery, bills, informations, and answers required the signature of counsel. Admiralty pleadings have been signed both by counsel and proctor. In the Probate Court pleadings were not signed.

Pleadings should now consist of two parts only; the statement

of facts required by this rule, and the claim of relief required by r. 8. To state any conclusions of law from the facts alleged is unnecessary and improper: *Watson* v. *Rodwell*, 3 Ch. D. 380, C. A.; *Hanmer* v. *Flight*, 24 W. R. 346; 35 L. T. 127, C. P. D.; S. C. in C. A., 36 L. T. 279; *Williamson* v. *London & North Western Railway*, 12 Ch. D. 787; *Re Parton*, 30 W. R. 287; and such statements of law may, if the Court think fit, be struck out as embarrassing under O. XXVII., r. 1: *Stokes* v. *Grant*, 4 C. P. D. 25.

In an action for defamation the defamatory words must be set out: *Harris* v. *Warre*, 4 C. P. D. 125. As to pleading justification, see *Scott* v. *Sampson*, 8 Q. B. D. 491.

As to stating the plaintiff's title in an action for the recovery of land, see *Evelyn* v. *Evelyn*, 28 W. R. 531; *Phillips* v. *Phillips*, 4 Q. B. D. at pp. 132, 138, C. A.

The rule that evidence is not to be pleaded, applies to admissions as well as to other evidence: *Davy* v. *Garrett*, 7 Ch. D. 473, C. A.

This rule requires pleadings to be concise. If unduly prolix, the party pleading may either be saddled with costs, see r. 2 of this Order, *supra*, p. 248, or the pleading may, under O. XXVII., r. 1, be struck out as embarrassing: *Davy* v. *Garrett*, 7 Ch. D. 473, C. A.

See some general remarks on the scope of this rule in *Turquand* v. *Fearon*, 40 L. T. 543, C. A., and *Millington* v. *Loring*, 6 Q. B. D. at p. 196, C. A.

R. 5. Printing. (R. S. C., June, 1876, r. 9.)

5. Every pleading which shall contain less than [ten] folios of seventy-two words each (every figure being counted as one word) may be either printed or written, or partly printed and partly written, and every other pleading, not being a petition or summons, shall be printed.

In the rule as originally issued *three* folios was the limit at which printing became necessary. This was altered to ten by the rule noted in the margin.

The use of printed pleadings is new, except as regards the Chancery Division, and in the Admiralty.

All pleadings, when required to be printed, are to be printed by the parties: R. S. C. (Costs), Orders I. to V., *post*, p. 604, where provisions will be found for printing, delivery of copies, and costs relating thereto.

R. 6. Delivery of pleadings.

6. Every pleading or other document required to be delivered to a party, or between parties, shall be delivered in the manner now in use to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor, but if no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer.

A notice of motion for judgment on default of pleading under O. XXIX., r. 10, *post*, p. 285, and O. LIII., r, 3, *post*, p. 399, is within this rule, and where the defendant has not appeared, may be served by filing: *Dymond* v. *Croft*, 3 Ch. D. 512, M. R.; *Morton* v. *Miller*, *Ibid.* 516, C. A.; *Williams* v. *Cardwell*, 25 W. R. 646.

Where a defendant does not appear, but he has been served personally with a copy of the writ and statement of claim, it

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is unnecessary in order to get judgment by default, that a copy of the statement of claim should also be filed: *Renshaw* v. *Renshaw*, 49 L. J. Ch. 127; and where a defendant becomes bankrupt after notice of trial, and an order of revivor is made against the trustee and served on him, it is unnecessary to file the pleadings under this rule if the trustee does not appear: *Chorlton* v. *Dickie*, 13 Ch. D. 160, Fry, J.

R. 7. Delivery to parties. Pleading: how marked.

7. Every pleading in an action shall be delivered between parties, and shall be marked on the face with the date of the day on which it is delivered, and with the reference to the letter and number of the action, the division to which, and the judge (if any) to whom the action is assigned, the title of the action, the description of the pleading, and the name and place of business of the solicitor and agent, if any, delivering the same, or the name and address of the party delivering the same if he does not act by a solicitor.

Before these Acts, Chancery pleadings were filed, as well as served on the parties; so were pleadings in the Admiralty and Probate Courts. In the Common Law Courts pleadings were merely served and not filed, except where it was necessary to file a declaration upon default of appearance. See note to O. XIII., rr. 5 to 6, *ante*, pp. 217, 218. Under the above rule, all pleadings are, in the first instance, to be delivered between the parties; but when judgment is entered, then, by O. XLI., r. 1, *post*, p. 361, a copy of the pleadings is to be delivered to the proper officer, presumably to be filed. As to the times for delivering pleadings, see O. XXI., and notes thereto, *post*, p. 264; O. XXII., *post*, p. 267; O. XXIV., *post*, p. 273; O. LVII., *post*, p. 412. As to the letter and number, see O. V., r. 8, *ante*, p. 195.

R. 8. Claim of relief. Discovery.

8. Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief. And the same rule shall apply to any counter-claim made, or relief claimed by the defendant, in his statement of defence. If the plaintiff's claim be for discovery only, the statement of claim shall show it.

General relief.

The claimant is to state his facts and his claim to relief, not the proposition of law by virtue of which his right arises out of his facts: *Watson* v. *Rodwell*, 3 Ch. D. 380, C. A.; *Hanmer* v. *Flight*, 24 W. R. 346; 35 L. T. 127, C. P. D.; in C. A. 36 L. T. 279. Nor need he distribute his facts and show which support each claim of relief: *Watson* v. *Hawkins*, 24 W. R. 884, C. P. D. The present rule must be followed equally in a claim or a counter-claim: the claimant is not entitled to any relief unless he has claimed it specifically, or asked for general relief: *Holloway* v. *York*, 25 W. R. 627, M. R. As to amendment of pleadings, see O. XXVII., *post*, p. 274.

As to the duty of the Court to take cognizance of equities which appear incidentally, see sub-s. 4 of s. 24 of the Act of 1873, *ante*,

p. 21. As to the grant of a mandamus or injunction, or the appointment of a receiver by interlocutory order, see s. 25, sub-s. 8 of that Act, *ante*, p. 29, and note thereto. Order XIX. rr. 8—10.

The Judicature Acts and Rules contain no provisions as to particulars. Particulars are, however, recognised by the forms of April, 1880, which by virtue of s. 100 of the Act of 1873, operate as Rules of Court: see Appendix H, forms Nos. 9, 10, 11, *post*, p. 580. In actions of the nature of Common Law actions, orders for particulars are made by the Court in the exercise of its inherent jurisdiction according to the old practice: *Augustus* v. *Nerinex*, 16 Ch. D. 13, C. A. In an action by an executor to charge a certain fund in respect of advances made by the testator under a partnership agreement, and praying for an account, an application for particulars made by the defendant was refused: *Ibid.* Where the plaintiff, in the claim indorsed on the writ, gave credit to the defendant for a lump sum, particulars as to how that sum was made up were ordered: *Godden* v. *Corsten*, 5 C. P. D. 17. See further *Harbord* v. *Monk*, 38 L. T. 411. Particulars.

Where in an action against a company, one of its officers was made a defendant merely for purposes of discovery, his name was ordered to be struck out, as the case was provided for by O. XXXI., r. 4: *Wilson* v. *Church*, 9 Ch. D. 552. This rule contemplates substantive actions for discovery. Discovery.

9. Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly. And the same rule shall apply where the defendant relies upon several distinct grounds of defence, set-off, or counter-claim founded upon separate and distinct facts. R. 9. Distinct claim or defences.

As to the joinder of several causes of action, see O. XVII., *ante*, p. 242.

10. Where any defendant seeks to rely upon any facts as supporting a right of set-off or counter-claim, he shall, in his statement of defence, state specifically that he does so by way of set-off or counter-claim. R. 10. Set-off or counter-claim: how stated.

Under this rule the defendant must distinguish what facts he relies upon as supporting his counter-claim. He must not leave them to be inferred from the statement of claim, or mix them indiscriminately with those constituting his defence proper: *Holloway* v. *York*, 25 W. R. 627, M. R.; *Crowe* v. *Barnicot*, L. R. 6 Ch. D. 753, Fry, J.; *Hillman* v. *Mayhew*, 24 W. R. 485, M. R. It is not ordinarily necessary, though it is usual, for a counter-claim to be specifically entitled as "counter-claim:" *Lees* v. *Patterson*, 7 Ch. D. 866. But where new parties are brought in by counter-claim, O. XXII., r. 5, *post*, p. 268, provides that the defendant "shall add to the title of his defence a further title similar to the title in a statement of complaint." A counter-claim may refer to statements of facts in the statement of claim or statement of defence without setting out the paragraphs referred to *in extenso*:

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Birmingham Estates Co. v. *Smith*, 13 Ch. D. 506, at 509, M. R. As to the claim of relief in a counter-claim, see r. 8, *ante*, p. 254. See Appendix (C), Nos. 10, 14, 24, *post*, pp. 506, 515, 532.

R. 11. Representative character.

11. If either party wishes to deny the right of any other party to claim as executor, or as trustee whether in bankruptcy or otherwise, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he shall deny the same specifically.

R. 12. Denial of interest in Probate action.

12. In Probate actions where the plaintiff disputes the interest of the defendant, he shall allege in his statement of claim that he denies the defendant's interest.

See *Medcalf* v. *James*, 25 W. R. 63, P. D.

R. 13. Pleas in abatement abolished.

13. No plea or defence shall be pleaded in abatement.

A plea in abatement in a Common Law action was a plea which, without disputing the cause of action alleged, stated facts showing that the plaintiff could not properly recover in the action as brought. Such a plea was generally founded upon some personal disability of parties, or upon defect of parties. As to defect of parties, see O. XVI., rr. 13 to 16, *ante*, p. 234; and *Kendall* v. *Hamilton*, 4 App. Cas. at 516, per Lord Cairns.

R. 14. New assignment abolished.

14. No new assignment shall hereafter be necessary or used. But everything which has heretofore been alleged by way of new assignment may hereafter be introduced by amendment of the statement of claim.

It frequently happened in Common Law pleading that a plaintiff has stated his cause of action in the declaration, and the defendant has pleaded to it something which, if true, would seem to be an answer to the plaintiff's complaint; but that in truth the defendant has, wholly or partially, mistaken the cause of action to which the declaration was intended to refer. The action might be for breach of covenant to repair, and the plea might allege a release; but the plaintiff might really be going for breaches subsequent to the alleged release. Or, in an action of trespass to which a justification was pleaded, the plaintiff might really mean to complain of a different trespass from that sought to be justified, or of acts on the occasion in question in excess of what the alleged justification would cover. In such cases, the plaintiff's only course was to new assign, that is to say, to restate his cause of complaint with greater precision, so as to show the inapplicability of the defence pleaded. The defendant then pleaded to the new assignment. See Bullen & Leake's Precedents of Pleadings, p. 653, note (*b*), ed. 3; 1 Chitty's Archbold, p. 303, ed. 12.

It is obvious that the necessity for new assignments arose solely from the generality of Common Law pleadings, and the absence of detail in those matters of fact on which the identification of the real cause of action depends. Under the present system, in which the statement of claim is a narrative of the facts of the case, it is unlikely that any such misapprehensions as those which gave rise

to new assignments need arise. An example of pleading, in a case in which there would hitherto certainly have been a new assignment, will be found in Appendix (C), No. 27, *post*, p. 539. Order XIX. rr. 14—16.

If such misapprehension does arise, it may, under this rule, be corrected by amendment of the statement of claim. The amendment may be made as of right, without any order for the purpose, under O. XXVII., r. 2, *post*, p. 276.

A reply must not set up new claims by the plaintiff: *Williamson* v. *London and North Western Railway*, 12 Ch. D. 787; and see r. 19, *post*, p. 259.

15. No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession. And he may nevertheless rely upon any ground of defence which he can prove, except as hereinbefore mentioned. R. 15. Defence in action for land.

In an action for the recovery of land, in the form of an ejectment, according to the practice as regulated by the C. L. P. Act, 1852, there were no pleadings. The question tried was simply whether or not the plaintiff was entitled to the possession of the land on the day laid in the writ. Under the new procedure there is no special form of action for the recovery of land. See note to O. II., r. 3, *ante*, p. 187. There are, therefore, pleadings in actions to recover land as well as in other actions. The above rule is for the protection of defendants in such actions, in the cases specified.

A defence simply alleging that the defendant is in possession of the land claimed, without denying the allegations of the claim, operates as a denial of the plaintiff's title, and compels him to prove the allegations of his statement of claim: *Danford* v. *M'Anulty*, 6 Q. B. D. 645, C. A.

Where the defendant relies on an equitable title, he must set out the material facts on which he relies as the foundation of his title: *Sutcliffe* v. *James*, 27 W. R. 750.

16. Nothing in these Rules contained shall affect the right of any defendant to plead not guilty by statute. And every defence of not guilty by statute shall have the same effect as a plea of not guilty by statute has heretofore had. But if the defendant so plead he shall not plead any other defence without the leave of the Court or a judge. R. 16. Not guilty by statute.

A large number of Acts, from early times down to the present, have contained provisions whereby particular persons, sued for particular classes of acts, may plead in answer the simple plea of not guilty, without further disclosing the defence on which they mean to rely, and may still prove any defence in justification which they can substantiate. By R. G., T. T., 1853, Rule 21, the defendant must in such case insert in the margin of such plea the words "by statute," adding the year, chapter, and section of

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any statutes on which he relies, and stating whether they are public or not.

This privilege has been most frequently given for the protection of persons sued in respect of acts done in connection with the discharge of public or official duties. But it is by no means confined to such cases. See many instances collected in Bullen & Leake's Precedents of Pleadings, pp. 704, *et seq.*, ed. 3. The right of so pleading is preserved by this rule.

R. 17.

Allegations not denied are admitted.

17. Every allegation of fact in any pleading in an action, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition.

The principle, that each party is taken to admit those allegations in the pleading of the opposite party which he does not deny, has always been a fundamental doctrine of Common Law pleading. It did not prevail in Chancery. Its introduction into Chancery pleadings, supplemented as it is by Rule 20 of this Order, prohibiting mere general denials in the cases to which it applies, and the disentanglement at the same time of Chancery pleadings from discovery, with which they have hitherto been mixed up, may not improbably have the effect of materially changing the character of pleadings in the Chancery Division.

Where a defendant by his defence simply "put the plaintiffs to prove the allegations of their claim," and did not appear at the trial, it was held that the statement of claim was admitted, and that no evidence need be adduced: *Harris* v. *Gamble*; see, too, *Green* v. *Serin*, 13 Ch. D. 589. As to evasive denial, see *Tildesley* v. *Harper*, 10 Ch. D. 393, C. A.

The provisions of r. 15, *supra*, engraft an exception on this rule: see *Danford* v. *M'Anulty*, 6 Ex. D. 645, C. A.

As to moving for judgment on admissions, see O. XL. r. 11, *post*, p. 356. As to the course when one of several defendants is an infant, see *National and Provincial Bank* v. *Evans*, 30 W. R. 177.

R. 18.

What facts must be pleaded.

18. Each party in any pleading, not being a petition or summons, must allege all such facts not appearing in the previous pleadings as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as if not raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings, as for instance, fraud, or that any claim has been barred by the Statute of Limitations or has been released.

Statute of limitations.

The defence of the statute of limitations, where it merely bars the remedy, cannot perhaps be raised by demurrer, although the facts appear on the statement of claim: *Wakeley* v. *Davis*, 25 W. R. 60, Q. B. D.: sed *contra*, *Noyes* v. *Crawley*, 10 Ch. D. 31, V.-C. M. But it is otherwise where, as with land, it goes to the right of property: *Dawkins* v. *Lord Penrhyn*, 6 Ch. D. 318, C. A., and 4 App. Cas. at pp. 58, 64; *Willis* v. *Earl Howe*, 50 L. J. Ch. 4.

19. No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same. R. 19. Inconsistent pleadings.

This rule is in accordance with the rule both at Common Law and in Chancery, except that it allows a larger right of amendment than was allowed in Chancery. By r. 14, *supra*, new assignments are abolished.

A reply must not set up new claims: *Williamson* v. *London and North Western Ry.*, 12 Ch. D. 787.

20. It shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the statement of claim, or for a plaintiff in his reply to deny generally the facts alleged in a defence by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth. R. 20. Specific denial.

See *Thorp* v. *Holdsworth*, 3 Ch. D. 637, M. R.; *Byrd* v. *Nunn*, 5 Ch. D. 781, Fry, J., affirmed 7 Ch. D. 284, C. A.; *Harris* v. *Gamble*, 7 Ch. D. 877, as to defences. As to an evasive denial, see *Tildesley* v. *Harper*, 10 Ch. D. 393, C. A. See further rr. 15, 17, *supra*. Unless the allegations of the statement of claim are specifically denied the plaintiff is entitled to move for judgment as upon admissions: *Rutter* v. *Tregent*, 12 Ch. D. 758.

A reply to a counter claim is in the nature of a statement of defence: see *Williamson* v. *London and North Western Railway*, 12 Ch. D. 787; *Green* v. *Sevin*, 13 Ch. D. 589. The defendant therefore cannot merely join issue on a counter-claim: *Benbow* v. *Low*, 13 Ch. D. 533, V.-C. B., declining to follow *Rolfe* v. *Maclaren*, 3 Ch. D. 106, V.-C. H. Counter-claim.

21. Subject to the last preceding Rule, the plaintiff by his reply may join issue upon the defence, and each party in his pleading, if any, subsequent to reply, may join issue upon the previous pleading. Such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted. R. 21. Joinder of issue.

See note to the last rule.

The effect of these two rules taken together is, that, whether in the case of a claim by the plaintiff or a counter-claim by the defendant, the opposing party is not at liberty to deny the facts alleged in general terms, but must deal with them in detail. But the party who has once told his own story in detail may, by a mere joinder of issue, deny in general terms what his opponent alleges in answer, unless the answer be by way of counter-claim. Joinder of issue, however, is to operate merely by way of denial. Of course, if the party entitled to join issue is not content with

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mere denial, and wishes to introduce new facts to answer his opponent's allegations, he must plead those facts under r. 18 of this Order; and a plaintiff has a right to do so in reply: *Hall* v. *Eve*, 4 Ch. D. 341, C. A.; or he may amend his previous pleadings.

R. 22. Evasive denial.

22. When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And so when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along with those circumstances, but a fair and substantial answer must be given.

This rule is founded on Chan. Cons. Ord. XV., r. 2; Morgan's Acts and Orders, p. 452, ed. 4.

As to the strictness with which this rule is construed, see *Thorp* v. *Holdsworth*, L. R. 3 Ch. D. 637, M. R.; *Byrd* v. *Nunn*, L. R. 5 Ch. D. 711, Fry, J.; 7 Ch. D. 284, C. A. As to conditions under which leave to amend will be given when an evasive denial has been pleaded, see *Tildesley* v. *Harper*, 10 Ch. D. 393, C. A.

R. 23. Denial of contract: Legality: Statute of frauds.

23. When a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of frauds or otherwise.

The rule requiring an objection founded upon the Statute of frauds to be pleaded specially is construed strictly. Thus, where one party, asserting a contract, alleged circumstances in anticipation of an objection on the ground of the statute, and these were traversed, it was held that the statute could not be relied upon: *Clarke* v. *Callow*, 46 L. J. Q. B. 53, C. A. Where, however, a defendant had demurred on the ground that the statute was not complied with, and his demurrer was overruled, it was held that the objection was sufficiently taken once for all, and might be insisted upon at the hearing without again pleading it: *Johnasson* v. *Bonhote*, 2 Ch. D. 298, C. A. As to the reasons for requiring the statute to be pleaded, see *Darkins* v. *Lord Penrhyn*, 4 App. Cas. at p. 58, per Lord Cairns. This objection cannot properly be taken by demurrer, *Catling* v. *King*, 25 W. R. at p. 551, C. A. As to mode of pleading the statute, see *Pulling* v. *Sueius*, 48 L. J. C. P. 394.

R. 24. Contents of documents.

24. Whenever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof unless the precise words of the document or any part thereof are material.

In an action for libel the precise words are material: *Harris* v. *Warre*, 4 C. P. D. 125; and where answers to interrogatories are referred to, it seems that the interrogatories and answers should be set out: *Williamson* v. *London and North Western Ry. Co.*, 12 Ch. D. 787, V.-C. H.

R. 25. Malice, fraud, or other mental state.

25. Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

See *Sandys* v. *Florence*, 47 L. J. 598, as to alleging negligence, and *Davey* v. *Garret*, 7 Ch. D. 483, at p. 489, as to alleging fraud; but see *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, as to allegations of fraud where this rule was not in question.

R. 26. Notice.

26. Wherever it is material to allege notice to any person of any fact, matter, or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice be material.

R. 27. Implied contract.

27. Wherever any contract or any relation between any persons does not arise from an express agreement, but is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances, without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

For an example of this method of pleading, see Appendix C., No. 5, *post*, p. 496. If the contract relied on is a contract in writing, the fact should be stated: *Turquand* v. *Fearon*, 40 L. T. 543, C. A.

R. 28. Burden of proof.

28. Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied.

[E.g.—Consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim.]

See Appendix (C), Nos. 6 and 7, *post*, p. 498.

R. 29. Filing in district registry.

29. Where an action proceeds in a district registry all pleadings and other documents required to be filed shall be filed in the district registry.

Order XIX. rr. 29a, 30.

Chancery Division Actions. (R. S. C., March, 1879, r. 4.)

29a. When a cause in the Chancery Division is proceeding in a District Registry, all certificates of the Chief Clerk and Taxing Masters and all affidavits and other documents (required to be filed) used in London before the judge in Chambers, or before any Taxing Master or Referee of the Court, and not already filed in the District Registry, shall be filed in the same office as they would have been filed in if the proceedings had originally commenced in London; and if the Court or judge shall so direct, office copies thereof shall be transmitted to the District Registry.

As to when an action is to proceed in the district registry, see O. XII., rr. 4 and 5, *ante*, p. 211. As to proceedings in district registries generally, see note to O. V., r. 1, *ante*, p. 191. As to filing pleadings, see r. 7 of this Order, *ante*, p. 254, and note thereto.

R. 30.

Admiralty action.

Preliminary Act.

30. In actions for damage by collision between vessels, unless the Court or a judge shall otherwise order, each solicitor shall, before any pleading is delivered, file with the proper officer a document to be called a Preliminary Act, which shall be sealed up and shall not be opened until ordered by the Court or a judge, and which shall contain a statement of the following particulars:—

(*a.*) The names of the vessels which came into collision and the names of their masters.

(*b.*) The time of the collision.

(*c.*) The place of the collision.

(*d.*) The direction of the wind.

(*e.*) The state of the weather.

(*f.*) The state and force of the tide.

(*g.*) The course and speed of the vessel when the other was first seen.

(*h.*) The lights, if any, carried by her.

(*i.*) The distance and bearing of the other vessel when first seen.

(*k.*) The lights, if any, of the other vessel which were first seen.

(*l.*) Whether any lights of the other vessel, other than those first seen, came into view before the collision.

(*m.*) What measures were taken, and when, to avoid the collision.

(*n.*) The parts of each vessel which first came into contact.

If both solicitors consent, the Court or a judge may order the preliminary acts to be opened and the evidence to be taken thereon without its being necessary to deliver any pleadings.

See *The John Boyne*, 25 W. R. 756; 36 L. T. 29, P. D.

ORDER XX.

Order XX.

PLEADING MATTERS ARISING PENDING THE ACTION.

R. 1. Defence to claim.

1. Any ground of defence which has arisen after action brought, but before the defendant has delivered his statement of defence, and before the time limited for his doing so has expired, may be pleaded by the defendant in his statement of defence, either alone or together with other grounds of defence. And if, after a statement of defence has been delivered, any ground of defence arises to any set-off or counter-claim alleged therein by the defendant, it may be pleaded by the plaintiff in his reply, either alone or together with any other ground of reply.

Defence to counter-claim.

The plaintiff may counter-claim to the defendant's counter-claim in respect of the same transaction, *Toke* v. *Andrews*, 8 Q. B. D. 428.

R. 2. Defence after pleading.

2. Where any ground of defence arises after the defendant has delivered a statement of defence, or after the time limited for his doing so has expired, the defendant may, and where any ground of defence to any set-off or counter-claim arises after reply, or after the time limited for delivering a reply has expired, the plaintiff may, within eight days after such ground of defence has arisen, and by leave of the Court or a judge, deliver a further defence or further reply, as the case may be, setting forth the same.

R. 3. Confession of defence.

3. Whenever any defendant, in his statement of defence, or in any further statement of defence as in the last Rule mentioned, alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence, which confession may be in the Form No. 2 in Appendix (B) hereto, with such variations as circumstances may require, and he may thereupon sign judgment for his costs up to the time of the pleading of such defence unless the Court or a judge shall, either before or after the delivery of such confession, otherwise order.

Costs.

For the form here referred to, see *post*, p. 475, and for a form of judgment, see *post*, p. 540.

The provisions of this Order are in substance the same, with a few exceptions, as those of ss. 68 and 69 of the C. L. P. Act, 1852, and Rules 22 and 23 of R. G., T. T., 1853. But by those rules the right to confess the plea, and take judgment for costs, was expressly excluded where the matter arising after action was pleaded by one of several defendants. There is no such limitation in this order. The extension also in express terms of the right of setting

Order XX. r. 3.

up a defence arising after action brought to the case of a plaintiff answering a set-off or counter-claim is new. As to when matter so arising could formerly be replied, see *Eyton* v. *Littledale*, 4 Ex. 159; *Newington* v. *Levy*, L. R. 5 C. P. 607; L. R. 6 C. P. 180. It will be observed that the right to confess under Rule 3 is limited to the plaintiff.

Under the rules referred to as in force before the Judicature Acts, where a defence arising after plea was pleaded, in addition to other defences previously pleaded in bar of the action, the plaintiff might confess the plea, and have his costs; the other defences falling to the ground. And it appears to be the same under the present rules: *Foster* v. *Gamgee*, 1 Q. B. D. 666.

These rules apply where the defendant is adjudicated bankrupt after action brought upon an act of bankruptcy committed before action brought: *Champion* v. *Formby*, 7 Ch. D. 373.

These rules apply to counter-claims in the nature of a pecuniary set-off arising after action brought: *Ellis* v. *Munson*, 35 L. T. 585, C. A., and they have been held to apply to counter-claims generally: *Beddall* v. *Maitland*, 17 Ch. D. 174, Fry, J. See, however, the observations of Jessel, M. R., in *Original Hartlepool Collieries Co.* v. *Gibb*, 5 Ch. D. 713; and note, *ante*, p. 252.

Payment into Court is not a defence within the meaning of this rule: *Callander* v. *Hawkins*, 2 C. P. D. 592.

Such a confession of a defence as that here provided for does not operate as a mere discontinuance of the action, or leave the plaintiff at liberty to commence a fresh action. It is a determination of the matters in litigation, and precludes any second action for the same cause: *Newington* v. *Levy*, L. R. 5 C. P. 607; 6 C. P 180.

Order XXI.

ORDER XXI.

STATEMENT OF CLAIM.

R. 1.

Delivery of statement of claim.

1. Subject to Rules 2 and 3 of this Order, the delivery of statements of claim shall be regulated as follows:—

(*a.*) If the defendant shall not state that he does not require the delivery of a statement of claim, the plaintiff shall, unless otherwise ordered by the Court or a judge, deliver it within six weeks from the time of the defendant's entering his appearance.

(*b.*) The plaintiff may, if he think fit, at any time after the issue of the writ of summons, deliver a statement of claim, with the writ of summons or notice in lieu of writ of summons, or at any time afterwards, either before or after appearance, and although the defendant may have appeared and stated that he does not require the delivery of a statement of claim: Provided that in no case where a defendant has appeared shall a statement be delivered more than six weeks after the ap-

pearance has been entered, unless otherwise ordered by the Court or a judge. Order XXI. r. 1.

(*c.*) Where a plaintiff delivers a statement of claim without being required to do so, the Court or a judge may make such order as to the costs occasioned thereby as shall seem just, if it appears that the delivery of a statement of claim was unnecessary or improper.

The statement that the defendant does not require a statement of claim is to be at the time of appearance. See O. XII., r. 10, *ante*, p. 213; Appendix (A), Pt. 1, Form No. 6, *post*, p. 460; O. XIX., r. 2, *ante*, p. 248.

Formerly the plaintiff in a Common Law action, of strict right, had the whole of the term next after the appearance of the defendant to deliver his declaration. If he did not declare within that time, after notice to declare, he was liable to judgment of non pros. If no such judgment was entered, he had a year after service of the writ to declare in, after which he was out of Court. See C. L. P. Act, 1852, ss. 53, 58; notes to those sections in Day's C. L. P. Acts, 88, 92, ed. 4; 1 Chitty's Archbold, p. 223, ed. 12.

In Chancery, no question on this point could arise: the bill, which was the statement of claim, being itself the commencement of the action.

Under O. XIX., r. 2, and this rule, the plaintiff must deliver a statement of claim, if the defendant has appeared, and has not given notice at the time of appearance dispensing with its delivery. He may deliver a statement, although either the defendant has not appeared, or has appeared and dispensed with its delivery. But as to costs, see R. S. C. (Costs), *post*, p. 628, r. 18. There has been a difference of opinion among the judges of the Chancery Division as to the propriety of delivering a statement of claim in cases intended to be heard as short causes: Jessel, M. R., in *Taylor* v. *Duckett*, W. N. 1875, p. 193, and Hall, V.-C., in *Green* v. *Colcby*, 1 Ch. D. 693, held that a statement of claim should be dispensed with in such cases; whereas Malins, V.-C., in *Breton* v. *Mockett*, 33 L. T. 684, *Boyes* v. *Cook*, *Ibid.*, 778, held a statement to be necessary whenever the order to be made depends on a written instrument.

The statement of claim may be served with the writ of summons, or, in ordinary cases, at any time between that and six weeks after appearance.

In Probate Cases, the time may be longer, since, by rule 2, if the defendant has appeared, the plaintiff has eight days from the filing of the defendant's affidavit of scripts for delivering his statement.

In Admiralty actions in rem, by rule 3 the statement of claim must be delivered within twelve days from appearance. Where a ship is under arrest it might well be unjust to allow any delay on the part of the plaintiff before disclosing his claim.

These times may be either enlarged or abridged by order of a judge; and an order for enlargement may be made either before or after the prescribed time has expired: O. LVII., r. 6, *post*, p. 412.

No pleadings can be either delivered or amended in the long vacation, except by order of the Court or a judge; and the period of the long vacation is not to be reckoned in computing the

Order XXI. rr. 1—4.

time for delivering any pleading, unless otherwise directed by the Court or a judge: O. LVII., rr. 4, 5, *post*, p. 412.

By O. LVII., r. 3, *post*, p. 411, "Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day," the next day is allowed.

R. 2. Probate actions.

2. In Probate actions the plaintiff shall, unless otherwise ordered by the Court or a judge, deliver his statement of claim within six weeks from the entry of appearance by the defendant, or from the time limited for his appearance, in case he has made default; but where the defendant has appeared the plaintiff shall not be compelled to deliver it until the expiration of eight days after the defendant has filed his affidavit as to scripts.

R. 3. Admiralty actions.

3. In Admiralty actions in rem the plaintiff shall, within twelve days from the appearance of the defendant, deliver his statement of claim.

R. 4. Notice in lieu of statement.

4. Where the writ is specially indorsed, and the defendant has not dispensed with a statement of claim, it shall be sufficient for the plaintiff to deliver as his statement of claim a notice to the effect that his claim is that which appears by the indorsement upon the writ, unless the Court or a judge shall order him to deliver a further statement. Such notice may be either written or printed, or partly written and partly printed, and may be in the Form No. 3 in the Appendix (B) hereto, and shall be marked on the face in the same manner as is required in the case of an ordinary statement of claim. And when the plaintiff is ordered to deliver such further statement it shall be delivered within such time as by such order shall be directed, and if no time be so limited then within the time prescribed by Rule 1 of this Order.

For the form here referred to see *post*, p. 475.

The special indorsement referred to is where the claim is merely for debt or liquidated demand, and the writ is indorsed with particulars of the claim, under O. III., r. 6, *ante*, p. 188.

In all the simpler classes of money claims, as for the price of goods, arrears of rent or salary, money lent, on bills or notes, and the like, the cheap and easy process provided by this rule is largely used. The special indorsement on the writ, if fairly framed, in the great majority of cases gives the defendant all the information he can need as to the claim he has to meet. If in any case the indorsement is insufficient for this purpose, an application for further particulars can be made under this rule.

Where a writ is specially indorsed, and notice is given under this rule, the indorsement constitutes a pleading and may be

demurred to if it does not disclose a good cause of action: *Robertson* v. *Howard*, 3 C. P. D. 280. Order XXI. r. 4.

Where a writ claims specific sums, and also claims damages and an injunction, it is not specially indorsed within the meaning of this rule: *Yeatman* v. *Snow*, 28 W. R. 574.

ORDER XXII.

Order XXII.

DEFENCE.

1. Where a statement of claim is delivered to a defendant he shall deliver his defence within eight days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless such time is extended by the Court or a judge. R. 1. Delivery of defence where claim delivered.

Formerly, the defendant in a Common Law action had eight days to plead: C. L. P. Act, 1852, s. 63. The time was always freely enlarged when necessary, but as a general rule only upon terms; the material one of which was, that the defendant should take short notice, that is a four days' notice, of trial. See O. XXXVI., r. 9, *post*, p. 322. In Chancery, a defendant required to answer had twenty-eight days from the delivery of the interrogatories. See Chanc. Cons. Ord. XXXVII., Rule 4; Morgan's Acts and Orders, p. 567, ed. 4; Dan. Ch. Pr. 640, ed. 5.

In Admiralty suits the time to answer was twelve days: Adm. Rules 68. In Probate suits the time to plead was eight days: Rule 38, Contentious Business.

The time being now fixed at so short a period as eight days in all the divisions, further time to defend has to be obtained in the great majority of cases.

As to the extension or reduction of the time for pleading by plaintiff, and as to the computation of time and vacations, see note to O. XXI., r. 1, *ante*, p. 264; and Oo. LVII. and LXI., *post*, pp. 412, 437.

As to the time for delivering a further defence, founded upon matters arising after defence delivered, see O. XX., r. 2, *ante*, p. 263.

Defence in this rule includes a demurrer; a defendant, therefore, who has obtained an extension of time to defend may within that time demur: *Hodges* v. *Hodges*, 2 Ch. D. 112, M. R.

2. A defendant who has appeared in an action and stated that he does not require the delivery of a statement of claim, and to whom a statement of claim is not delivered, may deliver a defence at any time within eight days after his appearance, unless such time is extended by the Court or a judge. R. 2. Where no claim delivered.

If the plaintiff has delivered a statement of claim, then, under O. XIX., r. 2, and r. 1 of this order, the defendant is

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bound to deliver a defence. If he fail to do so, judgment may be had against him by default, under O. XXIX., rr. 2 to 11. But if the statement of claim has been delivered uncalled for and improperly, the plaintiff may be ordered to pay the costs occasioned thereby: O. XXI., r. 1, *ante*, p. 264; and R. S. C. (Costs), *post*, p. 628, r. 18.

If the defendant at the time of his appearance (O. XII., r. 10, *ante*, p. 213; Appendix (A), Pt. 1, Form No. 6, *post*, p. 460; O. XIX., r. 2, *ante*, p. 248), dispenses with the delivery of a statement of claim, and if the plaintiff takes advantage of the notice and delivers none, then the defendant is, by this rule, not bound to deliver any defence. The effect appears to be, that in such a case pleadings are dispensed with by mutual consent, the indorsement on the writ alone identifying the controversy to be decided; and it has been so held by Lindley, J., at Chambers, in *Hooper* v. *Giles*, W. N., 1876, p. 10. This rule, however, reserves to the defendant the right to deliver a defence, although no statement of claim has been delivered.

R. 3. Where leave to defend obtained.

3. Where leave has been given to a defendant to defend under Order XIV., Rule 1, he shall deliver his defence, if any, within such time as shall be limited by the order giving him leave to defend, or if no time is thereby limited, then within eight days after the order.

This refers to the case of a writ specially indorsed, when the plaintiff has applied for judgment notwithstanding appearance. It has been held, that a defendant obtaining leave to defend must under this rule deliver a statement of defence within the time specified, although no statement of claim has been delivered: *Atkins* v. *Taylor*, W. N. 1876, p. 11, per Lindley, J., at Chambers; *Margate Pier Co.* v. *Perry*, *Ibid.*, p. 52, per Archibald, J., at Chambers.

R. 4. Improper denial. Costs.

4. Where the Court or a judge shall be of opinion that any allegations of fact denied or not admitted by the defence ought to have been admitted, the Court may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted.

By O. XIX., r. 17, *ante*, p. 258, any allegation not denied or stated not to be admitted is to be taken as admitted. Admissions may also be made by notice apart from the pleadings: O. XXXII., r. 1, *post*, p. 303.

R. 5. Counter-claim against other person as well as plaintiff.

5. Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other person or persons, he shall add to the title of his defence a further title similar to the title in a statement of complaint, setting forth the names of all the persons who, if such counter-claim were to be enforced by cross action, would be defendants to such cross action, and shall deliver his defence to such of

them as are parties to the action within the period within which he is required to deliver it to the plaintiff.

The right of a defendant to join other persons besides the plaintiff in a counter-claim depends upon s. 24, sub-s. 3, of the Act of 1873, *ante*, p. 20. See O. XIX., r. 3, *ante*, p. 249, and note thereto.

R. 6. Where third person not yet a party.

6. Where any such person as in the last preceding Rule mentioned is not a party to the action, he shall be summoned to appear by being served with a copy of the defence, and such service shall be regulated by the same Rules as are hereinbefore contained with respect to the service of a writ of summons, and every defence so served shall be indorsed in the Form No. 4 in Appendix (B) hereto, or to the like effect.

For the form here referred to, see *post*, p. 475.
As to service of writs of summons, see Oo. IX., X., XI., *ante*, pp. 200—210.

R. 7. Appearance by third person.

7. Any person not a defendant to the action, who is served with a defence and counter-claim as aforesaid, must appear thereto as if he had been served with a writ of summons to appear in an action.

As to appearance, see O. XII., *ante*, p. 210.

R. 8. Reply to counter-claim.

8. Any person named in a defence as a party to a counter-claim thereby made may deliver a reply within the time within which he might deliver a defence if it were a statement of claim.

The time to deliver a defence is eight days, unless the time is enlarged: Rule 1 of this Order, *ante*, p. 267, see also O. XX., r. 1.

R. 9. Striking out counter-claim.

9. Where a defendant by his statement of defence sets up a counter-claim, if the plaintiff or any other person named in manner aforesaid as party to such counter-claim contends that the claim thereby raised ought not to be disposed of by way of counter-claim, but in an independent action, he may at any time before reply, apply to the Court or a judge for an order that such counter-claim may be excluded, and the Court or a judge may, on the hearing of such application, make such order as shall be just.

A counter-claim can only be brought in cases where an action would lie. Where a counter-claim discloses no cause of action it may either be met by demurrer, see for instance *The Sir Charles Napier*, 5 P. D. 73, C. A., or it seems it may be struck out under this rule: *Birmingham Estates Co.* v. *Smith*, 13 Ch. D. 506.

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Where the counter-claim discloses a *primâ facie* ground of action, but is embarrassing, the remedy is provided by this rule.

There is a slight discrepancy between the language of this rule and of r. 3 of O. XIX., *ante*, p. 249. See note to that rule, *ante*, p. 250.

For instances of the exercise of the discretion given by this rule, see *Dear* v. *Sworder*, 4 Ch. D. 476, V.-C. H.; *Lee* v. *Colyer*, W. N., 1876, p. 8, Quain, J., at Chambers; *Atwood* v. *Miller*, *Ibid.*, p. 11, Lindley, J., at Chambers; *Bartholomew* v. *Rawling*, *Ibid.*, p. 56, Archibald, J., at Chambers; *Macdonald* v. *Bode*, *Ibid.*, p. 23, Lindley, J., at Chambers; *McLay* v. *Sharp*, W. N. 1877, p. 216, M.R.; *Harris* v. *Gamble*, 6 Ch. D. 748. In *Nicholson* v. *Jackson*, W. N. 1876, p. 38, Lindley, J., at Chambers, a counter-claim was struck out without prejudice to a cross action, on the terms that execution should not issue in the original action without the leave of a judge.

In an action for rent, a counter-claim for damages for a libel unconnected with the original action was excluded: *Rotheram* v. *Priest*, 28 W. R. 477. In an action for dissolution of partnership in one trade, a counter-claim for services rendered by the defendant to the plaintiff in another trade, was excluded: *Naylor* v. *Farrer*, 26 W. R. 809. See also *Macdonald* v. *Carrington*, 4 C. P. D. 28. See *Hodson* v. *Mochi*, 8 Ch. D. 569, and *Huggons* v. *Treed & Co.*, 10 Ch. D. 359, for instances where counter-claims were allowed.

R. 10. Judgment for balance of counter-claim.

10. Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case.

See sec. 24, sub-s. 6, of the Act of 1873, *ante*, p. 24; O. XIX. rule 3, *ante*, p. 249, and note thereto.

The balance referred to in this rule is the balance which, on the hearing of the action, after taking into account the claims on both sides, may be found due to the defendant: *Rolfe* v. *Maclaren*, 3 Ch. D. 106, V.-C. H. See also per Jessel, M. R., in *Chapman* v. *Royal Netherlands Steam Navigation Co.*, 4 P. D., at p. 162.

R. 11. Probate actions. Notice to prove in solemn form.

11. In Probate actions the party opposing a will may, with his defence, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances according to the practice of the Court of Probate.

This rule is in accordance with the practice formerly existing in the Probate Court under Rule 41 of Rules, Contentious Business, 1862.

ORDER XXIII.

Order XXIII.

DISCONTINUANCE.

R. 1. Discontinuance. 1. The plaintiff may, at any time before receipt of the defendant's statement of defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay the defendant's costs of the action, or, if the action be not wholly discontinued, the defendant's costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this Rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the Court or a judge, but the Court or a judge may, before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may seem fit, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court or a judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave.

Costs.

Withdrawal of record.

Striking out defence.

In the Common Law Courts, it was open to the plaintiff at any time before judgment to discontinue his action upon payment of costs: R. G., H. T. 1853, Rule 23; 2 Chitty's Archbold, p. 1483, ed. 12. Discontinuance was an abandonment of the pending action; but it left the plaintiff open to commence another action for the same cause, if he thought fit.

In Chancery, before a defendant appeared the plaintiff might have his bill dismissed as against him, without costs; after appearance, but before decree, on payment of costs; after decree, only by consent.

It was also the right of the party who entered a cause for trial to withdraw the record at any time before the jury were sworn to try the cause: in which case he had to pay the costs of the day. The effect of withdrawing the record was to revoke the entry of the cause for trial (causes having been entered for trial by delivering the nisi prius record to the officer of the Court); but it left the right of re-entering the cause for trial subsequently.

This order is one of several in the present body of rules which materially curtail the plaintiff's freedom of control over the conduct of the cause, and leave him much less fully dominus

Order XXIII. rr. 1—2a.

Discontinuance.

litis than he was formerly. He must deliver his statement of claim within six weeks after appearance: O. XXI., r. 1, *ante*, p. 264; and his reply within three weeks after defence: O. XXIV., r. 1, *post*, p. 273. His right to discontinue is by these rules restrained. If he fail to give notice of trial within a limited time, the defendant may either do so himself: O. XXXVI., r. 4, *post*, p. 320; or apply to have the action dismissed for want of prosecution: O. XXXVI., r. 4a, *post*, p. 320. He cannot by these rules withdraw the record, except by leave or consent. Nor can he countermand notice of trial if he has once given it, except by consent, or with leave: O. XXXVI., r. 13, *post*, p. 323. And he cannot, as heretofore, elect to be nonsuited, reserving the right to bring a fresh action for the same cause. A nonsuit, unless otherwise directed, will be equivalent to a judgment on the merits for the defendant, subject to its being set aside for cause: O. XLI., r. 6, *post*, p. 362.

If the statement of defence sets up matters arising after the issue of the writ of summons, the truth of which the plaintiff cannot deny, and which afford a good answer in law, the proper course for the plaintiff will be, not to discontinue under this Order, but to enter a confession of the defence, and take judgment for his costs under O. XX., r. 3, *ante*, p. 263.

Notice of discontinuance vacates a notice of appeal previously given by the plaintiff, and puts an end to the appeal even against the defendant's wish: *Conybeare* v. *Lewis*, 13 Ch. D. 469, C. A. And if the plaintiff discontinues the defendant cannot proceed on his counter-claim: *Varasseur* v. *Krupp*, 15 Ch. D. 474; but see the remarks of Fry, J., on this case in *Beddall* v. *Maitland*, 17 Ch. D. 174, at p. 183. As to the discontinuance of a test action see *Robinson* v. *Chadwick*, 7 Ch. D. 878. Where an action had been referred to an arbitrator to state a special case, and the arbitrator had stated the case, the Court refused to allow the plaintiff to discontinue: *Stahlschmidt* v. *Walford*, 4 Q. B. D. 217. See too *Matthews* v. *Antrobus*, 49 L. J. Ch. 80.

A letter by the plaintiff's solicitors to the defendant's solicitors, stating that they "were instructed to proceed no further with the action," was held a sufficient notice of discontinuance: *The Pommerania*, 4 P. D. 195.

Where a plaintiff had obtained an interlocutory injunction on the usual undertaking as to damages, and subsequently discontinued, an inquiry as to damages was granted eleven months afterwards: *Newcomen* v. *Coulson*, 7 Ch. D. 764.

R. 2.

Withdrawal of record by consent. (R. S. C., Dec., 1875, r. 9.)

2. When a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant, upon producing to the proper officer a consent in writing, signed by the parties.

R. 2a.

Costs on discontinuance. (R. S. C., June, 1876, r. 10.)

2a. A defendant may sign judgment for the costs of an action if it is wholly discontinued, or for the costs occasioned by the matter withdrawn, if the action be not wholly discontinued.

Rule 1 of this Order gave the defendant a right to his costs on discontinuance, but contained no express provision as to entering judgment or issuing execution for them: see *Bolton* v. *Bolton*,

3 Ch. D. 276, V.-C. H. The Rules of April, 1880, give a form of judgment: see Appendix D., Form No. 13, *post*, p. 545. Order XXIII. r. 2a.

As to the proper mode of taxing costs on discontinuance, see *Harrison* v. *Leutner*, 16 Ch. D. 559. See too *Real and Personal Advance Co.* v. *M'Carthy*, 14 Ch. D. 188, affirmed 45 L. T. 116, C.A., as to the withdrawal of his defence by one of several defendants.

In country cases the party who entered the cause for trial must give immediate notice of withdrawal to the Registrar: see O. XXXVI., r. 15a, *post*, p. 323.

ORDER XXIV.

Order XXIV.

Reply and Subsequent Pleadings.

1. A plaintiff shall deliver his reply, if any, within three weeks after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the Court or a judge. R. 1. Delivery of reply or subsequent pleading.

The time for reply in the Common Law Courts was unlimited, subject to the right of the defendant to call upon the plaintiff to reply: C. L. P. Act, 1852, s. 53. In Admiralty suits six days were allowed: Adm. Rules, Rule 68. In Probate suits, eight days: Rules, Contentious Business, Rule 39.

In Chancery, replications might be filed within four weeks after the answer, or the last of the answers required to be put in, was held or deemed to be sufficient: Dan. Ch. Pr. 735, ed. 5; but they were used less frequently than at law. Any matter which the plaintiff found it necessary to bring forward in addition to what he stated in his bill was introduced, ordinarily, by way of amendment of his bill.

As to what matters may be replied, see O. XIX., rr. 2, 14, 19–21, *ante*, p. 248, and notes thereto.

As to extension of time for pleading, the computation of time, and vacations, see note to O. XXI., r. 1, *ante*, p. 264.

As to the time for delivering a further reply to a counter-claim founded upon matter arising after reply or the time for reply, see O. XX., r. 2, *ante*, p. 263.

By O. XXIX., r. 12, non-delivery of reply is a close of the pleadings, and an admission of the last pleading.

In *Litton* v. *Litton*, 3 Ch. D. 793, V.-C. H., where the plaintiff did not reply to the statement of defence, it was held that the defendant could not move for judgment under O. XL., r. 11; but that he should give notice of trial under O. XXXVI., r. 4a,, but see the comments on this case in *Pascal* v. *Richards*, 44 L. T. 87, M. R., and the note to r. 3, and see to the contrary *Lumsden* v. *Winter*, 8 Q. B. D. 650.

2. No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a judge, and then upon such terms as the Court or judge shall think fit. R. 2. Leave for subsequent pleadings.

Order XXIV. r. 3.

R. 3. Time for delivery.

3. Subject to the last preceding Rule, every pleading subsequent to reply shall be delivered within four days after the delivery of the previous pleading, unless the time shall be extended by the Court or a judge.

See note to r. 1, and see O. XXIX., r. 12, as to the effect of not complying with this rule.

In an unreported case, *Denbigh* v. *Combe*, 1879, C. P. D., cited in Archibald's Country Solicitors' Practice, p. 199, where the plaintiff made default in delivery of a rejoinder, the Court made an order for judgment, under O. XL., r. 11, unless the plaintiff should deliver his rejoinder within four days. This course appears to be the only available mode of enforcing this rule without going to trial.

Order XXV.

ORDER XXV.

Close of Pleadings.

Close of pleadings.

As soon as either party has joined issue upon any pleading of the opposite party simply without adding any further or other pleading thereto, the pleadings as between such parties shall be deemed to be closed.

See also O. XXIX., r. 12, *post*, p. 286.

Order XXVI.

ORDER XXVI.

Issues.

R. 1. Settlement of issues.

Where in any action it appears to a judge that the statement of a claim or defence or reply does not sufficiently define the issues of fact in dispute between the parties, he may direct the parties to prepare issues, and such issues shall, if the parties differ, be settled by the judge.

Order XXVII.

ORDER XXVII.

Amendment of Pleadings.

R. 1. Amendment with leave.

1. The Court or a judge may, at any stage of the proceedings, allow either party to alter his statement of claim or defence or reply, or may order to be struck out

Order XXVII. r. 1.

or amended any matter in such statements respectively which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties.

Two kinds of alterations of pleadings are here provided for: first, amendment on the application of the party pleading, in order to enable him to raise his real case; secondly, striking out or amending, for the benefit of the opposite party, an improper or embarrassing pleading. This rule does not in terms apply to counter-claims. As to them, see rr. 3 and 6.

Amendment.

The power of amendment of pleadings, at the instance of the party pleading, is exercised freely. It will be done in a proper case after the cause has been entered for trial: *Roe* v. *Davies*, 2 Ch. D. 729, V.-C. B.; or at the trial: *Budding* v. *Murdoch*, 1 Ch. D. 42, M. R.; *King* v. *Corke*, *Ibid.*, 57, V.-C. B. See too *Ashley* v. *Taylor*, 10 Ch. D. 768; *Green* v. *Sevin*, 13 Ch. D. 589, at p. 595; *Long* v. *Crossley*, 13 Ch. D. 388; *Nobel* v. *Jones*, 17 Ch. D. 721; *Betts* v. *Doughty*, 5 P. D. 26; and so as to raise an entirely new case, requiring fresh evidence: *Ibid.*; but the Court in the exercise of its discretion, may refuse to allow such an amendment: *Newby* v. *Sharpe*, 8 Ch. D. 39, C. A.; *Cargill* v. *Bower*, 10 Ch. D. 502; but see *Laird* v. *Briggs*, 19 Ch. D. 22 C. A. An action may be turned into an information at the suit of the Attorney-General: *Caldwell* v. *Pagham Harbour Co.*, 2 Ch. D. 221, V.-C. H. The cases as to amendment decided upon this rule only illustrate a course of procedure long in familiar use in the Common Law Courts, under the C. L. P. Act, 1852, s. 222; C. L. P. Act, 1854, s. 96; and C. L. P. Act, 1860, s. 36. As to the principle on which amendments should be allowed or disallowed, see per Bramwell, L. J., in *Tildesley* v. *Harper*, 10 Ch. D. 393, at p. 396, C. A. Where leave to amend is refused at the trial, and judgment is given against the party applying to amend, an appeal against the judgment includes an appeal against the order refusing leave to amend. No separate appeal from such order is necessary: *Laird* v. *Briggs*, 16 Ch. D. 663, C. A. An affidavit showing the nature of a new defence sought to be added, or its materiality, is not required: *Cargill* v. *Bower*, 4 Ch. D. 78, V.-C. M.; *Chesterfield Co.* v. *Black*, 25 W. R. 409, V.-C. B.

Striking out.

The power of striking out pleadings, or parts of pleadings, or causing them to be amended, on the application of the opposite party, is not so exercised as to enable one party to dictate to the other how he shall plead; but it is exercised in the cases enumerated in the rule, where the pleading is scandalous, or tends to prejudice, embarrass, or delay the fair trial of the action; as, where a claim was unintelligible, and contained scandalous and irrelevant statements: *Cashin* v. *Cradock*, 3 Ch. D. 376, C. A.; or statements immaterial and tending to create prejudice: *Blake* v. *Albion Life Assurance Society*, 45 L. J. C. P. 663; see also *Heap* v. *Marris*, 2 Q. B. D. 630.

In an action by a wife for rectification of her settlement, allegations of acts of immorality by the husband were struck out: *Coyle* v. *Cumming*, 27 W. R. 529. In an action for breach of promise of marriage, an allegation of seduction was held to be material: *Millington* v. *Loring*, 6 Q. B. D. 190, C. A. A pleading is embarrassing which does not fairly comply with the provisions

Order XXVII. rr. 1—3.

of O. XIX., which prescribes what pleadings are to contain. See *Williamson* v. *L. & N. W. Railway*, 12 Ch. D. 787; *Heugh* v. *Chamberlain*, 25 W. R. 742, M. R. As to pleadings which are too prolix, see *Davy* v. *Garrett*, 7 Ch. D. 473, C. A. As to pleadings which are not sufficiently full and specific, see *Phillips* v. *Phillips*, 4 Q. B. D. 127, C. A.; *Evelyn* v. *Evelyn*, 28 W. R. 530. As to pleading matters of law, see *Stokes* v. *Grant*, 4 C. P. D. 25. It is now settled that payment into Court may be pleaded along with a defence denying the cause of action. Thus in an action by an agent for commission, payment into Court was allowed to be pleaded with a defence denying the employment, and also setting up the Statute of Limitations: *Berdan* v. *Greenwood*, 3 Ex. D. 251, C. A.; and in an action for libel payment into Court was allowed to be pleaded with a defence of justification: *Hawkesley* v. *Bradshaw*, 5 Q. B. D. 302, C. A.

Application to strike out pleadings should be made by summons: *Marriott* v. *Marriott*, 26 W. R. 416.

The striking out of pleadings as embarrassing is a matter of discretion; and the Court of Appeal will not ordinarily review a judge's decision, unless in an extreme case, or unless some question of principle is involved: *Golding* v. *Wharton Salt Works Co.*, 1 Q. B. D., 374, C. A.; *Watson* v. *Rodwell*, 3 Ch. D. 380, C. A.

Rule 11, *post*, p. 278, added by R. S. C., Feb. 1876, r. 6, gives power to amend the writ of summons.

By Rule 6 of this Order, an application to amend may be made to the Court, or to a judge at chambers, or to the judge at the trial.

By O. LVIII., r. 5, *post*, p. 421, the Court of Appeal has all the powers as to amendment of the Court of First Instance.

As to when amendments may be made without leave, see the next following rules.

As to amendments by striking out, adding, or substituting parties, see O. XVI., rr. 13 to 16, *ante*, p. 234.

As to the case of claims inconveniently joined, see O. XVII., rr. 1, 8, 9, *ante*, pp. 242—244, 246; and as to counter-claims inconveniently raised, see O. XXII., r. 9, *ante*, p. 269.

By O. XXVIII., r. 7, *post*, p. 281, no order for amendment is to be made while a demurrer is pending, except on payment of the costs of the demurrer.

R. 2.

Amendment by plaintiff without leave.

2. The plaintiff may, without any leave, amend his statement of claim once at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared.

The time to reply is three weeks from the delivery of the defence: O. XXIV., r. 1, *ante*, p. 273.

No amendment can be made without leave while a demurrer is pending, and such leave can only be given on payment of the costs of the demurrer: O. XXVIII., r. 7, *post*, p. 281.

R. 3.

Amendment by defendant without leave.

3. A defendant who has set up in his defence any set-off or counter-claim may, without any leave, amend such set-off or counter-claim at any time before the expiration of the time allowed him for pleading to the reply, and before pleading thereto, or in case there be no reply, then

at any time before the expiration of twenty-eight days from the filing of his defence. Order XXVII. rr. 3—8.

As to the time allowed to plead to a reply, see O. XXIV., r. 3, *ante*, p. 274.

4. Where any party has amended his pleading under either of the last two preceding Rules, the opposite party may, within eight days after the delivery to him of the amended pleading, apply to the Court, or a judge, to disallow the amendment, or any part thereof, and the Court or judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may seem just. R. 4. Disallowance of amendment.

5. Where any party has amended his pleading under Rule 2 or 3 of this Order, the other party may apply to the Court or a judge for leave to plead or amend his former pleading within such time and upon such terms as may seem just. R. 5. Leave to plead to amended pleading.

It will be observed that under this Order there is no absolute right in either party to amend his pleading or plead further because his opponent has amended; an order must be obtained under this rule. And if, when a cla m is amended, the defendant does not obtain an order to amend his defence, his original defence stands as his defence to the amended claim: *Boddy* v. *Wall*, 7 Ch. D. 164, M. R.

6. In all cases not provided for by the preceding Rules of this Order, application for leave to amend any pleading may be made by either party to the Court or a judge in Chambers, or to the judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may seem just. R. 6. Application for leave to amend.

7. If a party who has obtained an order for leave to amend a pleading delivered by him does not amend the same within the time limited for that purpose by the order, or if no time is thereby limited, then within fourteen days from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, or of such fourteen days, as the case may be, become ipso facto void, unless the time is extended by the Court or a Judge. R. 7. Failure to amend after order.

This rule is taken from Chan. Cons. Ord. IX., Rules 17, 24, and Ord. XXXIII., Rule 11; Morgan's Acts and Orders, 415, 417, ed. 4; Dan. Chan. Pr. 346, ed. 5.

8. A pleading may be amended by written alterations in the pleading which has been delivered, and by additions R. 8. Amendment by writing or reprint

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on paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than 144 words in any one place, or are so numerous or of such a nature that the making them in writing would render the pleading difficult or inconvenient to read, in either of which cases the amendment must be made by delivering a print of the pleading as amended.

See before these Acts, Chan. Cons. Ord. IX., Rule 18; Morgan, 415; Dan. 348.

As to when pleadings generally may be written and when they must be printed, see O. XIX., r. 5, *ante*, p. 253.

R. 9. Marking pleading as amended.

9. Whenever any pleading is amended, such pleading when amended shall be marked with the date of the order, if any, under which the same is so amended, and of the day on which such amendment is made, in manner following, viz.: "Amended day of ."

See before these Acts, Chan. Cons. Ord. IX., Rule 19; Morgan's Acts and Orders, 416, ed. 4; Dan. 349.

R. 10. Delivery of amended pleading.

10. Whenever a pleading is amended, such amended pleading shall be delivered to the opposite party within the time allowed for amending the same.

R. 11. Amendment of writ. (R. S. C., Feb., 1876, r. 6.)

11. The Court, or a judge, may, at any stage of the proceedings, allow the plaintiff to amend the writ of summons in such manner, and on such terms, as may seem just.

Except in the case provided for by O. XVI., r. 15, *ante*, p. 237, where a defendant has been added, it seems that it is unnecessary to amend the writ if the subject of amendment appears in the statement of claim: *Large* v. *Large*, W. N. 1877, p. 198; approved, *Johnson* v. *Palmer*, 4 C. P. D. at 262.

An amended writ is served in the same way as an original writ: *The Cassiopeia*, 4 P. D. 188, C. A.

Order XXVIII.

ORDER XXVIII.

DEMURRER.

R. 1. Demurrer to pleading.

1. Any party may demur to any pleading of the opposite party, or to any part of a pleading setting up a distinct cause of action, ground of defence, set-off, counterclaim, reply, or as the case may be, on the ground that the facts alleged therein do not show any cause of action

or ground of defence to a claim or any part thereof, or set-off, or counter-claim, or reply, or as the case may be, to which effect can be given by the Court as against the party demurring.

In Chancery a demurrer lay only to a bill, not to an answer. The Common Law practice of allowing a demurrer to any pleading, or any separate ground of claim or defence in any pleading, is here adopted. In Admiralty, demurrers were not formerly in use; but objections to the sufficiency of pleadings in point of law were taken by the analogous proceeding of a motion to disallow the pleadings: Williams and Bruce, Adm. Practice, p. 250.

A demurrer to a part of a statement of claim cannot be sustained if the matter demurred to supports the plaintiff's right to any relief. The plaintiff is not bound to distribute his statements of fact, and show which are intended to support each claim of relief: *Watson* v. *Hawkins*, 24 W. R. 884, C. P. D.

Where the statement of claim has been dispensed with under O. XXI., r. 4, the special indorsement on the writ constitutes "a pleading" within the meaning of this rule, and may be demurred to: *Robertson* v. *Howard*, 3 C. P. D. 280.

As to raising the defence of the Statute of Limitations by demurrer, see note to O. XIX., r. 18, *ante*, p. 258. As to demurring to damages, see *Powell* v. *Jewsbury*, 9 Ch. D. 34, C. A.

The old Chancery rule that a defendant cannot demur to a pleading which he has answered is now abrogated: *Powell* v. *Jewsbury*, *ubi supra*.

A party should not demur, unless the demurrer goes to the whole cause of action, and finally disposes of the matter: see *Layman* v. *Latimer*, 47 L. J. Ex. at 472, C. A. The Court has complete control over costs.

Where a counter-claim discloses no cause of action, it may either be met by demurrer: see, for instance, *The Sir Charles Napier*, 5 P. D. 73, C. A.; or it may be struck out as embarrassing: see for example, *Birmingham Estates Co.* v. *Smith*, 13 Ch. D. 506.

Demurrers for want of parties are no longer allowed: *Werdermann* v. *Société Générale d'Electricité*, 19 Ch. D. 246, C. A. The practice under O. XVI., r. 13, *ante*, p. 234, is now substituted.

R. 2. Form of demurrer.

2. A demurrer shall state specifically whether it is to the whole or to a part, and if so, to what part, of the pleading of the opposite party. It shall state some ground in law for the demurrer, but the party demurring shall not, on the argument of the demurrer, be limited to the ground so stated. A demurrer may be in the Form 28 in Appendix (C) hereto. If there is no ground, or only a frivolous ground of demurrer stated, the Court or judge may set aside such demurrer, with costs.

For the form here referred to, see *post*, p. 540. As to what is a sufficient statement of "some ground in law," see *Bidder* v. *McLean*, 30 W. R. 529, C. A.

R. 3. Delivery of demurrer.

3. A demurrer shall be delivered in the same manner and within the same time as any other pleading in the action.

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As to delivery of pleadings, see O. XIX., rr. 6, 7, *ante*, pp. 253, 254.

As to times for pleading, see O. XXI., r. 1, and note thereto, *ante*, p. 264; O. XXII., rr. 1, 2, 3, 8, *ante*, pp. 267 to 269; O. XXIV., rr. 1, 3, *ante*, p. 273, 274.

A defendant who has obtained an extension of time to deliver defence may within the same time demur: *Hodges* v. *Hodges*, 2 Ch. D. 112, M. R.

In the Queen's Bench Division demurrer books are still delivered according to the old practice.

R. 4.

Demurrer to part and pleading to part.

4. A defendant desiring to demur to part of a statement of claim, and to put in a defence to the other part, shall combine such demurrer and defence in one pleading. And so in every case where a party entitled to put in a further pleading desires to demur to part of the last pleading of the opposite party he shall combine such demurrer and other pleading.

There is nothing, it will be observed, in this rule authorizing any party as of right to plead and demur to the same matters, but only to different matters contained in the same pleading. But, apparently under the rule, whenever any party demurs and pleads at the same time, the pleading and demurrer must be one document, and not be delivered separately.

R. 5.

Leave to demur and plead to the same matter.

5. If the party demurring desires to be at liberty to plead as well as demur to the matter demurred to, he may, before demurring, apply to the Court or a judge for an order giving him leave to do so; and the Court or judge, if satisfied that there is reasonable ground for the demurrer, may make an order accordingly, or may reserve leave to him to plead after the demurrer is overruled, or may make such other order and upon such terms as may be just.

Where any party desires to demur, without precluding himself from also pleading to the same matter to which he demurs, three courses are open:

1. He may obtain leave, under this rule, to plead as well as demur. This is in accordance with the practice formerly observed in the Common Law Courts, under the C. L. P. Act, 1852, s. 80.

He may also under this rule obtain an order reserving him leave to plead in case the demurrer be overruled.

In either case leave is only to be given if the Court or judge is satisfied that there is reasonable ground for the demurrer, and terms may be imposed.

3. He may proceed with his demurrer simply, and leave it to the Court, if it overrules his demurrer, to give him leave to plead, under Rule 12 of this Order.

The Court of Appeal has held, that if a demurrer be overruled by the judge, the judge or the Court on the trial of the action is

not bound by the decision; but that the same question raised by the demurrer is open on the trial: *Johnasson* v. *Bonhote*, 2 Ch. D. 298, C. A. See also note to r. 12, *post*, p. 282.

R. 6. Entry for argument. Conse-quences of neglect.

6. When a demurrer either to the whole or part of a pleading is delivered, either party may enter the demurrer for argument immediately, and the party so entering such demurrer shall on the same day give notice thereof to the other party. If the demurrer shall not be entered and notice thereof given within ten days after delivery, and if the party whose pleading is demurred to does not within such time serve an order for leave to amend, the demurrer shall be held sufficient for the same purposes and with the same result as to costs as if it had been allowed on argument.

This rule is founded on Chan. Cons. Ord. XIV., Rules 14, 15; Morgan's Acts and Orders, 448, ed. 4; Dan. Ch. Pr., 510, ed. 5.

Although this rule leaves it open to either party to enter a demurrer for argument, its practical effect is to compel the party demurred to to enter the demurrer, unless he amends his pleading: since the omission to take one or other of these courses within ten days will be equivalent to judgment against him on the demurrer with costs. As to the effect of judgment allowing a demurrer, see Rules 8, 9, 10 of this Order.

As to amendment pending a demurrer, see the next rule; and as to amendments generally, see O. XXVII., *ante*, p. 274.

R. 7. Amendment pending demurrer.

7. While a demurrer to the whole or any part of a pleading is pending, such pleading shall not be amended, unless by order of the Court or a Judge; and no such order shall be made except on payment of the costs of the demurrer.

See as to amendment, O. XXVII., *ante*, p. 274.

R. 8. Allowance of demurrer. Costs.

8. Where a demurrer to the whole or part of any pleading is allowed upon argument, the party whose pleading is demurred to shall, unless the Court otherwise order, pay to the demurring party the costs of the demurrer.

This Rule is taken from Chan. Cons. Ord. XIV., Rule 13; Morgan's Acts and Orders, 448, ed. 4; Dan. Ch. Pr. 515, ed. 5.

R. 9. Effect of allowance of demurrer to whole claim.

9. If a demurrer to the whole of a statement of claim be allowed, the plaintiff, subject to the power of the Court to allow the statement of claim to be amended, shall pay to the demurring defendant the costs of the action, unless the Court shall otherwise order.

See note to Rule 8. See *Hancock* v. *Lablache*, 3 C. P. D. at p. 202, for an order allowing the defendant's demurrer for want of

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parties, but giving the plaintiff leave to amend and serve interrogatories; but demurrers for want of parties it seems are now no longer allowed: *Werdermann* v. *Société Générale d'Electricité*, 19 Ch. D. 246, C. A. As to costs, see *White* v. *Bromige*, 26 W. R. 312.

R. 10. Effect in other cases.

10. Where a demurrer to any pleading or part of a pleading is allowed in any case not falling within the last preceding Rule, then (subject to the power of the Court to allow an amendment) the matter demurred to shall as between the parties to the demurrer be deemed to be struck out of the pleadings, and the rights of the parties shall be the same as if it had not been pleaded.

As to the terms on which leave to amend will be given where a demurrer to part of a pleading is allowed, see *The Sir Charles Napier*, 5 P. D. at 77, C. A.

R. 11. Overruling demurrer. Costs.

11. Where a demurrer is overruled the demurring party shall pay to the opposite party the costs occasioned by the demurrer, unless the Court shall otherwise direct.

This Rule is taken from Chan. Cons. Ord. XIV., Rule 12; Morgan's Acts and Orders, 447, ed. 4; Dan. Ch. Pr. 519, ed. 5.

R. 12. Leave to plead over.

12. Where a demurrer is overruled the Court may make such order and upon such terms as to the Court shall seem right for allowing the demurring party to raise by pleading any case he may be desirous to set up in opposition to the matter demurred to.

See note to Rule 5 of this Order. And see *Bell* v. *Wilkinson*, 26 W. R. 275, C. A., as to the obligation to give leave to plead.

R. 13. Form of entry for argument.

13. A demurrer shall be entered for argument by delivering to the proper officer a memorandum of entry in the Form No. 29 in Appendix (C).

For such form see *post*, p. 540.

Order XXIX.

ORDER XXIX.

DEFAULT OF PLEADING.

R. 1. Default of pleading.

1. If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the Court or a judge to

dismiss the action with costs, for want of prosecution; and on the hearing of such application the Court or judge may, if no statement of claim have been delivered, order the action to be dismissed accordingly, or may make such other order on such terms as to the Court or judge shall seem just.

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As to the time allowed, see O. XXI., r. 1, and note thereto, *ante*, p. 264.

Where, before statement of claim, an action was stayed until the plaintiff should give security for costs, and the time for delivering a statement of claim expired and no security had been given, it was held the action might be dismissed under this rule: *La Grange* v. *McAndrew*, 4 Q. B. D. 210.

Where the plaintiff made default in delivering his claim, and had become bankrupt, notice of motion to dismiss under this rule was ordered to be served upon the trustee in bankruptcy: *Wright* v. *Swindon Ry. Co.*, 4 Ch. D. 164, M. R. If justice requires it, the Court will of course give the plaintiff an extension of time upon terms: *Higginbottom* v. *Aynsley*, 3 Ch. D. 288, V.-C. H.

Default generally.

Where an order is made dismissing an action unless the plaintiff does some act within a specified time, and the plaintiff does not comply with the order, the action is at an end, and the time for doing the act in question cannot be extended: *Whistler* v. *Hancock*, 3 Q. B. D. 83; *Wallis* v. *Hepburn*, 3 Q. B. D. 84, n.; *King* v. *Davenport*, 4 Q. B. D. 402; but the order itself may be appealed against, and the time for appealing may be extended after the time limited by the order has expired: *Burke* v. *Rooney*, 4 C. P. D. 226; *Carter* v. *Stubbs*, 6 Q. B. D. 116, C. A. As to the enlargement of time for delivering pleadings by consent, see O. LVII., r. 6a, *post*, p. 413.

As to when application to dismiss should be made in the Chancery Division by motion instead of summons, see *Evelyn* v. *Evelyn*, 12 Ch. D. 138.

The dismissal of an action for non-prosecution is not a bar to subsequent proceedings in respect of the same matter: *Re Orrel Colliery and Firebrick Co.*, 12 Ch. D. 681, M. R.

2. If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose, deliver a defence or demurrer, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed, with costs.

R. 2. Non-delivery of defence: liquidated claim.

This is in accordance with the Common Law practice under the C. L. P. Act, 1852, s. 93.

For the mode of entering judgment on default of pleading in the Chancery Division, see Seton on Decrees, p. 12, ed. 4.

For form of final judgment under Rules 2 and 3, see Appendix (D), No. 1, *post*, p. 541; Seton, p. 7.

This rule has been held not to apply to an Admiralty action in rem. In such an action, upon default, the procedure is as before the Judicature Acts: *The Sfactoria*, 2 P. D. 3.

The rule applies to an action on a replevin bond where the plaintiff claims the amount of the bond instead of damages: *Dix* v. *Groom*, 5 Ex. D. 91.

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R. 3. Several defendants.

3. When in any such action as in the last preceding Rule mentioned there are several defendants, if one of them make default as mentioned in the last preceding Rule, the plaintiff may enter final judgment against the defendant so making default, and issue execution upon such judgment without prejudice to his right to proceed with his action against the other defendants.

This provision is new. See note to O. XIII., r. 4, *ante*, p. 217.

R. 4. Claim for goods or damages.

4. If the plaintiff's claim be for detention of goods and pecuniary damages, or either of them, and the defendant makes default as mentioned in Rule 2, the plaintiff may enter an interlocutory judgment against the defendant, and a writ of inquiry shall issue to assess the value of the goods and the damages, or the damages only, as the case may be. But the Court or a judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way in which any question arising in an action may be tried.

For forms of interlocutory judgment, and of judgment after assessment of damages, see Appendix (D), No. 3, *post*, p. 541; Seton, p. 8.

Formerly, in an action at law, damages in such a case could only be assessed by a sheriff's jury under a writ of inquiry, or by a master, in cases within s. 94 of the C. L. P. Act, 1852. See note to O. XIII., r. 6, *ante*, p. 218.

R. 5. Several defendants.

5. When in any such action as in Rule 4 mentioned there are several defendants, if one of them make default as mentioned in Rule 2, the plaintiff may enter an interlocutory judgment against the defendant so making default, and proceed with his action against the others. And in such case, damages against the defendant making default shall be assessed at the same time with the trial of the action or issues therein against the other defendants, unless the Court or a judge shall otherwise direct.

This is in accordance with the former practice in the Common Law Courts.

R. 6. Debt and damages.

6. If the plaintiff's claim be for a debt or liquidated demand, and also for detention of goods and pecuniary damages, or pecuniary damages only, and the defendant makes default as mentioned in Rule 2, the plaintiff may enter final judgment for the debt or liquidated demand, and also enter interlocutory judgment for the value of the goods and the damages, or the damages only, as the case may be, and proceed as mentioned in Rule 4.

For form of interlocutory judgment, see Seton, p. 8; and *post*, p. 544.

R. 7. Action for land.

7. In an action for the recovery of land, if the defendant makes default as mentioned in Rule 2, the plaintiff may enter a judgment that the person whose title is asserted in the writ of summons shall recover possession of the land, with his costs.

Formerly there were no pleadings in such actions: the proceedings being by action of ejectment. See note to O. II., r. 3, *ante*, p. 184.

For form of judgment, see Appendix (D), No. 2, *post*, p. 541; and Seton, p. 7.

R. 8. Action for land and damages.

8. Where the plaintiff has endorsed a claim for mesne profits, arrears of rent, or damages for breach of contract upon a writ for the recovery of land, if the defendant makes default as mentioned in Rule 2, or if there be more than one defendant, some or one of the defendants make such default, the plaintiff may enter judgment against the defaulting defendant or defendants, and proceed as mentioned in Rules 4 and 5.

R. 9. Probate action.

9. In Probate actions, if any defendant make default in filing and delivering a defence or demurrer, the action may proceed, notwithstanding such default.

R. 10. Other actions.

10. In all other actions than those in the preceding Rules of this Order mentioned, if the defendant makes default in delivering a defence or demurrer, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court shall consider the plaintiff to be entitled to.

For forms of judgment in the Chancery Division under this rule, see Seton, p. 38.

This rule applies in all actions other than actions for a debt, or damages, or the recovery of goods, or lands, or Probate actions.

Motion for judgment under this rule must be made in accordance with the provisions of O. XL., *post*, p. 354, and the directions issued by the judges under it: *post*, p. 355.

As to actions in district registries, see *Walker* v. *Robinson*, 24 W. R. 137, V.-C. B.; *Birmingham Waste Co.* v. *Lane*, *Ibid.*, 292, V.-C. H.

As to service of notice of motion being unnecessary, see *Williams* v. *Cardwell*, 25 W. R. 640; *Parsons* v. *Harris*, *ibid.* 410; as to evidence by affidavit, see *Ellis* v. *Robbins*, 50 L. J. Ch. 512; see, however, *Willmott* v. *Young*, 29 W. R. 413.

R. 11. Several defendants.

11. Where, in any such action as mentioned in the last preceding Rule, there are several defendants, then, if one of such defendants make such default as aforesaid, the plaintiff may either set down the action at once on

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motion for judgment against the defendant so making default, or may set it down against him at the time when it is entered for trial or set down on motion for judgment against the other defendants.

For forms of judgment in the Chancery Division under this rule, see Seton, p. 38.

R. 12. Non-delivery of reply or subsequent pleading.

12. If the plaintiff does not deliver a reply or demurrer, or any party does not deliver any subsequent pleading, or a demurrer, within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and the statements of fact in the pleading last delivered shall be deemed to be admitted.

The pleadings being closed by virtue of this rule, the plaintiff may give notice of trial under O. XXXVI., r. 4, *post*, p. 320. If he fails to do so within six weeks, the defendant may either give notice of trial himself under r. 4, or apply to have the action dismissed for want of prosecution under r. 4a of the same Order, *post*, p. 320: *Litton* v. *Litton*, 3 Ch. D. 793, V.-C. H.; and a defendant seeking to dismiss under such circumstances has been held not a party entitled to relief within the meaning of O. XL. r. 11: *Ibid*; but see to the contrary, *Lumsden* v. *Winter*, 8 Q. B. D. 650, and notes to O. XXIV., rr. 1, 3, *ante*, pp. 273, 274. If the defendant by counter-claim seeks substantive relief in the action, he has a right to move under O. XL., r. 11, see *Lumsden* v. *Winter*, 8 Q. B. D. 650.

See *Ambrose* v. *Evelyn*, 11 Ch. D. 759, M. R.

R. 13. Issue between others than plaintiff and defendant.

13. In any case in which issues arise in an action other than between plaintiff and defendant, if any party to any such issue makes default in delivering any pleading, the opposite party may apply to the Court or a judge for such judgment, if any, as upon the pleadings he may appear to be entitled to. And the Court may order judgment to be entered accordingly, or may make such other order as may be necessary to do complete justice between the parties.

See s. 24, sub-s. 3, of the Act of 1873, *ante*, p. 20; and O. XIX., r. 3, *ante*, p. 249, and note thereto.

R. 14. Setting aside judgment by default.

14. Any judgment by default, whether under this Order or under any other of these Rules, may be set aside by the Court or a judge, upon such terms as to costs or otherwise as such Court or judge may think fit.

Mere delay is not a reason for refusing to set aside a judgment by default. It must be shewn that some irreparable injury would result to the plaintiff; see *Attwood* v. *Chichester*, 3 Q. B. D. 722, C. A., where a judgment was set aside though no application to set it aside was made till nine months after it was signed: see also *Watt* v. *Barnett*, 3 Q. B. D. 363, C. A.

ORDER XXX.

Order XXX.

PAYMENT INTO COURT IN SATISFACTION.

1. Where any action is brought to recover a debt or damages, any defendant may at any time after service of the writ, and before or at the time of delivering his defence, or by leave of the Court or a judge at any later time, pay into Court a sum of money by way of satisfaction or amends. Payment into Court shall be pleaded in the defence, and the claim or cause of action in respect of which such payment shall be made shall be specified therein.

R. 1. Payment into Court. Time. Pleading.

Old practice.

In the Common Law Courts, the practice of paying money into Court in satisfaction of the plaintiff's claim was governed by several statutes.

By Lord Campbell's Libel Act (6 & 7 Vict. c. 96), s. 2, in an action for a libel contained in any public newspaper or periodical publication, the defendant may plead that the libel was inserted without actual malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, an apology was published or offered, and may pay money into Court by way of amends.

By s. 70 of the C. L. P. Act, 1852, payment into Court was allowed in all actions except actions for assault and battery, false imprisonment, libel, slander, or malicious arrest or prosecution, or debauching the plaintiff's daughter or servant. But s. 2 of 6 & 7 Vict. c. 96 was left unaffected.

The C. L. P. Act, 1860, gave to plaintiffs in replevin the right to pay into Court, by s. 23; and allowed defendants in actions upon common money bonds, and actions for the detention of goods, to do the same thing, by leave of the Court or a judge, by s. 25.

When allowed.

The language of the above rule, "any action . . . . brought to recover a debt or damages," seems to be wide enough to cover all the cases included in any of the Acts just referred to, except perhaps the case of a plaintiff in replevin. As to the case of replevin and any other cases, if any there be, not covered by this rule, the Acts which have hitherto authorized payment into Court will do so still. See ss. 23 and 76 of the Act of 1873, *ante*, pp. 18, 75; and s. 21 of the Act of 1875, *ante*, p. 112.

And the present rule omits all the exceptions contained in s. 70 of the C. L. P. Act, 1852, *supra*: so that money may be paid into Court, for the future, in the cases heretofore excepted.

The practice as to payment into Court in common law actions was governed by ss. 70 to 73 of the C. L. P. Act, 1852, and Rules 11, 12, and 13 of R. G., H. T., 1853.

The most material change of practice introduced by the present order is, that whereas, in a Common Law action, money could only be paid into Court at the time of pleading, for the future it may be paid in, in any action of debt or damages, at any time after service of the writ, down to and including the time of delivering the defence, or afterwards by leave. Accordingly, on the 12th

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In what cases.

November, 1875, an order was issued at the Judges' chambers of the Queen's Bench, Common Pleas, and Exchequer Divisions, as follows: "As money may now be paid into Court without leave at any time after service of the writ, and before defence, summonses to stay on payment of a smaller sum than the sum demanded will no longer be issued. Instead thereof, the amount shall be paid into Court, and the copy of the receipt sent to the plaintiff's solicitor." (W. N. 1875, Pt. I., p. 201.)

As affecting the question of costs, it may be of importance to pay money into Court as early as possible. If the money be paid in with leave after defence, it would seem that the defence must be amended.

By ss. 70, 72, of the C. L. P. Act, 1852, though a sole defendant, or all the defendants jointly, could pay into Court as of right, one or more of several had to obtain leave to do so. Rule 1 above contains no such restriction.

Questions of great difficulty often arose as to the effect of a simple payment into Court by way of admission, especially where the declaration contained common money counts. Under the new system of pleading it is probable that these difficulties will not arise.

Under the old procedure at law, a defendant could not pay money into Court, and also plead grounds of defence to the same claim. It is now settled that under this rule payment into Court may be pleaded with a statement of defence denying the cause of action. In *Potter* v. *Home and Colonial Ins. Co.*, cited 2 Q. B. D. p. 622, C. A., the defendant, in an action on a marine policy, was allowed to plead unseaworthiness and pay money into Court; in *Berdan* v. *Greenwood*, 3 Ex. D. 251, C. A., which was an action by an agent for commission, the defendant was allowed to plead a denial of the employment and pay money into Court: and in *Hawkesley* v. *Bradshaw*, 5 Q. B. D. 302, C. A., which was an action for libel, the defendant was allowed to plead justification and pay money into Court. On the construction of a similar rule in Ireland, it has been held that where the defendant pays money into Court and pleads denying the cause of action, the plaintiff may continue his action and yet take out of court the money paid in: *Coughlan* v. *Morris*, 6 Ir. L. R. Q. B. D. 405.

Where the plaintiff claims in respect of several distinct items, as for instance for separate pieces of work done, the defendant may still pay money into Court generally without specifying the particular items against which it is paid in: *Puraire* v. *Loibl*, 49 L. J. C. P. 481, C. A.

In actions in the Chancery Division, payments into Court are regulated by the Chancery Funds Rules, 1874 (L. R. 9 Ch. xxix.), made under the Court of Chancery Funds Act, 1872 (35 & 36 Vict. c. 44). See Seton on Decrees, pp. 73, *et seq.*, ed. 4; and see *Finlay* v. *Davis*, 12 Ch. D. 735.

To abide event.

Payment into Court in satisfaction must not be confused with the payment of money into Court to abide the event. If the defendant who has paid money into Court to abide the event ultimately succeeds he may get the money out again by application at chambers: see *Yorkshire Banking Co.* v. *Beatson*, 4 C. P. D. 213.

R. 2.

How paid.

2. Such sum of money shall be paid to the proper officer, who shall give a receipt for the same. If such payment be made before delivering his defence the de-

fendant shall thereupon serve upon the plaintiff a notice that he has paid in such money, and in respect of what claim, in the Form No. 5, in Appendix (B) hereto. **Order XXX. rr. 2—4.**

Notice.

For this form, see *post*, p. 476.

Formerly, in actions at law, the money being paid in at the time of pleading, the receipt was written in the margin of the plea: see s. 72 of C. L. P. Act, 1852; and the notice has been given only by plea.

3. Money paid into Court as aforesaid may, unless otherwise ordered by a judge, be paid out to the plaintiff, or to his solicitor, on the written authority of the plaintiff. No affidavit shall be necessary to verify the plaintiff's signature to such written authority unless specially required by the officer of the court. **R. 3.** Payment out.

This rule is the same in effect with s. 72 of C. L. P. Act, 1852, and Rule 11 of R. G., H. T. 1853, with the exception of the words "unless otherwise ordered by a judge," which are new. See note to rule 1 and *Coughlan* v. *Morris*, 6 Ir. L. R. Q. B. D. 405.

4. The plaintiff, if payment into Court is made before delivering a defence, may within four days after receipt of notice of such payment, or if such payment is first stated in a defence delivered then may before reply, accept the same in satisfaction of the causes of action in respect of which it is paid in; in which case he shall give notice to the defendant in the Form No. 6 in Appendix (B) hereto, and shall be at liberty, in case the sum paid in is accepted in satisfaction of the entire cause of action, to tax his costs, and in case of non-payment within forty-eight hours, to sign judgment for his costs so taxed. **R. 4.** Acceptance in satisfaction. Notice.

For the form here referred to, see *post*, p. 476, and for a form of judgment for costs, see *post*, p. 546.

Formerly, by s. 73 of the C. L. P. Act, 1852, the plaintiff, in the case dealt with by this rule, accepted the sum in satisfaction by his replication.

This rule contains provisions the same in substance as those previously in force in the Common Law Courts. The money may be paid in either in respect of the whole of the plaintiff's claim, or of part of it. This throws upon the plaintiff the election between two courses. He may accept the money in satisfaction of the claim in respect of which it is paid in, in which case this rule gives him his costs; or he may abstain from doing so. In the latter case the issue to be tried in the action is, whether the sum paid in is sufficient or not, and if that issue is found against the plaintiff, there is nothing in the rules to give him as of right any part of the costs. Thus, where £200 was paid into Court generally, and the action was referred before delivery of pleadings, Costs.

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costs to abide the event, and the £200 was found to be sufficient, it was held that the defendant should be allowed the whole costs: *Langridge* v. *Campbell*, 2 Ex. D. 281. But the Court in the exercise of its discretion may give the plaintiff his costs up to the time of payment into Court: *Buckton* v. *Higgs*, 4 Ex. D. 174; *Gretton* v. *Mees*, 7 Ch. D. 839. The control over costs given to the Court by O. LV. is complete. Thus where money was paid into Court and the plaintiff did not give notice that he accepted it in satisfaction until after the expiration of the four days, it was held that the Court might still in the exercise of its discretion give him his costs; *Greaves* v. *Fleming*, 4 Q. B. D. 226.

Order XXXI.

ORDER XXXI.

DISCOVERY AND INSPECTION.

R. 1. Discovery on interrogatories.

1. The plaintiff may, at the time of delivering his statement of claim, or at any subsequent time not later than the close of the pleadings, and a defendant may, at the time of delivering his defence, or at any subsequent time not later than the close of the pleadings, without any order for that purpose, and either party may at any time, by leave of the Court or a judge, deliver interrogatories in writing for the examination of the opposite party or parties, or any one or more of such parties, with a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose. Second set.

Former practice.

This rule has effected a very material change of practice in the Queen's Bench, Common Pleas, and Exchequer Divisions. In these Courts discovery by interrogatories formerly depended on ss. 51 and 52 of the C. L. P. Act, 1854. These sections, as they were construed, allowed interrogatories to be put only by leave of a judge; and the practice was not to give leave to interrogate generally, or even to interrogate upon such and such matters, but to settle at chambers the specific questions to be allowed. And, further, the application had ordinarily to be based upon an affidavit, both of the party and his attorney, that there was a good cause of action or defence upon the merits. This requirement often wrought injustice; for in many cases the very reason why interrogatories are needed is because the validity of the cause of action or defence may depend upon the result of the discovery.

In the Chancery Division, too, the changes introduced by this rule are very material. Before the Judicature Acts, if a plaintiff in Chancery desired to obtain discovery or admission from any defendant before the cause was at issue, he filed interrogatories for his examination, which interrogatories commonly covered the

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whole field of the bill; and such examination formed part of the defendant's answer to the plaintiff's bill. In certain cases the defendant, also, might, after answer, file a concise statement and interrogatories for the examination of the plaintiff; see 15 & 16 Vict. c. 86, ss. 12, *et seq.*

Discovery on interrogatories must be distinguished from discovery of documents, for in many respects different considerations apply to the two kinds of discovery: see per Cotton, L. J., in *Southwark Water Co.* v. *Quick*, 3 Q. B. D. at p. 321.

Application of rule.

See the definitions of the terms "plaintiff" and "defendant" in s. 100 of the Act of 1873, *ante*, p. 93. The terms of this rule seem only to contemplate the plaintiff and defendant in an action, but in *Re Alexandra Palace Co.*, 16 Ch. D. 58, it was held that the liquidator of a company was entitled under this rule to interrogate a person claiming to prove who had made an affidavit of documents. In *Molloy* v. *Kilby*, 15 Ch. D. 162, C. A., it was held that the defendant to a counter-claim, who was not a party to the original action, could not interrogate the original plaintiff, as they were not opposite parties within the meaning of this rule. Compare the language of this rule with the different language of rule 11 as to discovery of documents. Under s. 51 of the C. L. P. Act, 1852, interrogatories might be administered in "any cause," and it was held that "cause" included interpleader: *White* v. *Watts*, 31 L. J. C. P. 381. If this rule does not apply to interpleader recourse presumably may be had to the old procedure. As to interrogatories in election petitions, see *Wells* v. *Wren*, 5 C. P. D. 546.

Time.

The language of this rule being quite general the plaintiff is entitled to deliver interrogatories without waiting for the statement of defence. But under r. 5, now annulled, it was the practice in the Queen's Bench Division to strike out, as of course, interrogatories delivered before defence, unless some special ground was shown for allowing them to be administered at so early a stage: *Mercier* v. *Cotton*, 1 Q. B. D. 442, C. A. The same procedure seems still applicable under the substituted rule 5: see per Pollock, B., in *Gay* v. *Labouchere*, 4 Q. B. D. at p. 207. In *Beal* v. *Pilling*, 38 L. T. 486, C. P. D., where a defendant was added after the original defendant had delivered his defence, interrogatories to the new defendant were allowed before he had delivered any defence. In the Chancery Division, in actions not in the nature of common law actions, a plaintiff is justified in delivering interrogatories before the statement of defence without shewing special grounds: *Harbord* v. *Monk*, 9 Ch. D. 616, M. R.

A defendant will not, ordinarily, be allowed to interrogate under this rule before defence delivered: *Disney* v. *Longbourne*, 2 Ch. D. 704, M. R. But under special circumstances it may be allowed; as where the action was on a bill of exchange, and the defendant desired to know whether the plaintiff was a holder for value, and therefore whether he could defend the action or not: *Hawley* v. *Reade*, W. N. 1876, p. 64, per Archibald, J., at Chambers.

After the close of the pleadings there is no absolute right to interrogate. The Court or judge exercises a discretion, and will not allow the application to be made the occasion of unfair delay: *Ellis* v. *Ambler*, 25 W. R. 557, C. P. D.: *London and Provincial Insurance Co.* v. *Davies*, 5 Ch. D. 775, Fry, J.

Action for discovery.

An action for discovery only may, in a proper case, still be brought: *Orr* v. *Diaper*, 4 Ch. D. 92, V.-C. H. See also, O. XIX.,

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r. 8, *ante*, p 254. It will not lie in aid of a claim before a foreign tribunal: *Reiner* v. *Marquis of Salisbury*, 2 Ch. D. 378.

As to discovery in an Admiralty action, see *The Biola*, 24 W. R. 524, P. D.

As to striking out interrogatories or objecting to answer them, see r. 5, *post*, p. 293.

R. 2. Costs occasioned by interrogatories.

2. The Court in adjusting the costs of the action shall at the instance of any party inquire or cause inquiry to be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing master or of the Court or a judge that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be borne by the party in fault.

The taxing officer is to inquire into the matters referred to in this rule, whether specially ordered or not, and whether applied to for the purpose or not: R. S. C. (Costs), *post*, p. 628, r. 18.

R. 3. Form of interrogatories.

3. Interrogatories may be in the Form No. 7 in Appendix (B) hereto, with such variations as circumstances may require.

For such form, see *post*, p. 476, No. 7.

R. 4. Corporations and other bodies.

4. If any party to an action be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply at chambers for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly.

This rule is borrowed from s. 51 of the C. L. P. Act, 1854. In Chancery it was formerly necessary to make the officer a party in order to obtain discovery upon oath, or to file a cross bill: see Dan. Ch. Pr., pp. 132, 1402, ed. 5. But this rule provides a new and simpler procedure; and if an officer now be made a party for purposes of discovery only, the Court, under the powers given by O. XVI., r. 14, will order his name to be struck out: *Wilson* v. *Church*, 9 Ch. D. 552, M. R.

Where a foreign government is plaintiff, the Court will stay proceedings in the action until the government names a proper person to make discovery: *Republic of Costa Rica* v. *Erlanger*, 1 Ch. D. 171, C. A.

An ordinary member of a company should not be interrogated unless it can be shown that he has the required information, and that there is no officer of the company capable of giving it: *Berkeley* v. *Standard Discount Co.*, 13 Ch. D. 99, C. A., per Jessel, M. R. at p. 99. Where an ordinary member is examined he cannot refuse to file his affidavit in answer until he has been paid his

costs; nor will the Court make any order as to the payment of his costs separately from those of the company: *Ibid.* Where a corporation puts forward its town-clerk, who is also its solicitor in the action, to answer interrogatories, he cannot object to answer on the ground of privilege as a solicitor: *Mayor of Swansea* v. *Quirk*, 5 C. P. D. 106. As to the duty of officers of a corporation to obtain information for the purpose of answering interrogatories, see per Cotton, L. J., in *Southwark Water Co.* v. *Quick*, 3 Q. B. D. at p. 321, C. A.

R. 5.

Striking out interrogatories.

5. *Any party called upon to answer interrogatories, whether by himself or by any member or officer, may, within four days after service of the interrogatories, apply at chambers to strike out any interrogatory, on the ground that it is scandalous or irrelevant, or is not put bonâ fide for the purpose of the action, or that the matter inquired after is not sufficiently material at that stage of the action, or on any other ground. And the judge, if satisfied that any interrogatory is objectionable, may order it to be struck out.*

On the construction of this rule it was held that a party might in his affidavit object to answer interrogatories under Rule 8, although he might have applied to have had them struck out: *Fisher* v. *Owen*, 8 Ch. D. 645, C. A., overruling the doubt expressed in *Saunders* v. *Jones*, 7 Ch. D. 435; also that a party who applied to strike out interrogatories must specify those to which he objected: *Allhusen* v. *Labouchere*, 3 Q. B. D. 654, C. A.

R.S.C. Nov. 1878, r. 3.

Rules 5 and 8 of Order XXXI. are hereby repealed; the following Rule is substituted for the same:—

Objection to particular interrogatories.

Any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant, or not *bonâ fide* for the purpose of the action, or that the matters inquired into are not sufficiently material at that stage of the action, or on any other ground, may be taken in the affidavit in answer.

Application to strike out.

An application to set aside the interrogatories on the ground that they have been exhibited unreasonably or vexatiously, or to strike out any interrogatory or interrogatories, on the ground that it or they is or are scandalous, may be made at chambers within four days after service of the interrogatories.

Under the annulled rules the practice was to allow all discussions as to interrogatories to be raised upon the questions instead of upon the answers. The result was a considerable waste of time at Judge's Chambers over controversies about the propriety of particular questions. Nearly all these controversies turned on the question of relevancy. That is a matter better determined on the answer than on the question. In many cases the person interrogated finds it better to answer the question than to take the

Order XXXI. r. 5.

objection; and in many cases where he declines to answer, the interrogator finds that he can do without the answer. The judge, too, is often better able to decide whether a particular question ought to be answered when he has before him the party's answers to the other questions.

Under the new rules objection to interrogatories can only be taken at the question stage in three cases, namely: (1) where leave to administer interrogatories is required, under Rules 1 and 4; (2) where the whole set of interrogatories can be disposed of on the ground that they have been exhibited unreasonably or vexatiously; (3) where particular interrogatories are scandalous. Objections founded on any other grounds than those specified must be taken in the affidavit in answer: see *Gay* v. *Labouchere*, 4 Q. B. D. 206.

As to setting aside a set of interrogatories on the ground that they are unreasonable at the stage of the action at which they are exhibited, see *Mercier* v. *Cotton*, 1 Q. B. D. 442, C. A.; *Gay* v. *Labouchere*, 4 Q. B. D. at p. 107, per Pollock, B.; *Re Sutcliffe*, 44 L. T. 547, Fry, J.; and see note to Rule 1.

An interrogatory, tending to criminate, which is not relevant, may probably be struck out as scandalous: see *Allhusen* v. *Labouchere*, 3 Q. B. D. 654, C. A. In *Smith* v. *Berg*, 25 W. R. 606, an interrogatory asking whether the defendants, who were sued as husband and wife, were married was struck out as scandalous.

Objecting to answer.

When inadmissible questions are asked, the party interrogated may either answer the question or state in his affidavit that he refuses to answer. In the latter case he should specify his ground of objection. The rule, after specifying certain grounds of exception, provides that the party interrogated may object on these "or on any other ground." It is for the judge to determine the validity of the objection, if the party interrogating does not acquiesce in it.

It appears that the rules in equity have superseded the rules of Common Law as regards the question what interrogatories can or cannot be objected to: see per Cotton, L. J., in *Allhusen* v. *Labouchere*, 3 Q. B. D. at p. 666, C. A.; and see as to discovery generally, *Anderson* v. *Bank of British Columbia*, 2 Ch. D. at pp. 654, 658, C. A., per Jessel, M. R., and Mellish, L. J.

A party interrogated may object to answer questions tending to criminate: see *Fisher* v. *Owen*, 8 Ch. D. 645, C. A.; *Allhusen* v. *Labouchere*, 3 Q. B. D. 654, C. A.; but he cannot object to answer an interrogatory as to slanderous words used by him: *Atkinson* v. *Fosbroke*, L. R. 1 Q. B. 628.

In the case of a newspaper where, under 6 & 7 Will. 4, c. 76, s. 19, and 32 & 33 Vict. c. 24, a bill of discovery would have lain in aid of an action of libel, it has been held that the same discovery may now be had in an action: *Ramsden* v. *Brearley*, W. N. 1875, p. 199; *Carter* v. *Leeds Daily News*, W. N. 1876, p. 11; and now by the Newspapers Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), ss. 8, 9, 15, provision is made for the compulsory registration of the names of newspaper proprietors.

An interrogatory must be answered, although the answer may expose other persons to actions: *Tetley* v. *Easton*, 25 L. J. C. P. 293.

As to interrogatories to a defendant in an action to recover land, see *Lyell* v. *Kennedy*, 30 W. R. 493, C. A.

Interrogatories need not be answered which merely cross-examine as to credit: *Allhusen* v. *Labouchere*, 3 Q. B. D. 654, C. A.; see too *Bolckow* v. *Young*, 42 L. T. 690, C. P. D.; or which ask whether the allegations in the pleadings of the opposite party

are true: *Johns* v. *James*, 13 Ch. D. 370; or which ask details of the evidence as opposed to the facts on which the opposite party relies: *Eade* v. *Jacobs*, 3 Ex. D. 335, C. A.; as explained in *Att.-Gen.* v. *Gaskill*, 30 W. R. 558, C. A.; *Johns* v. *James*, 13 Ch. D. 370; *Lyon* v. *Tweddell*, 13 Ch. D. 375; *Benbow* v. *Low*, 16 Ch. D. 93, C. A. See further as to the relevancy of particular interrogatories, *Eade* v. *Jacobs*, *ubi supra*, action by executor for breach of covenant, questions as to verbal waiver by deceased; *Ashley* v. *Taylor*, 38 L. T. 44, C. A., action for false representations; *Saunders* v. *Jones*, 7 Ch. D. 435, C. A., action for wrongful dismissal, question as to the acts of misconduct relied on by defendant; see the comments on that case in *Benbow* v. *Low*, 16 Ch. D. 93, C. A.; and *Lyon* v. *Tweddell*, 13 Ch. D. 375; *Rowcliffe* v. *Leigh*, 6 Ch. D. 256, C. A.; *Sheward* v. *Lord Lonsdale*, 5 C. P. D. 47, C. A., sale of a horse, questions as to other similar dealings; *Benbow* v. *Low*, *ubi supra*; *Johns* v. *James*, *ubi supra*, as to accounts in actions claiming an account; *Mansfield* v. *Childerhouse*, 4 Ch. D. 82, questions as to irrelevant breach of trust. In *Parker* v. *Wills*, 18 Ch. D. 477, C. A., the defendant was allowed to object to questions the answers to which could not help plaintiff to obtain a decree, though they might be useful if he obtained it.

It does not follow that because a document is privileged, the information derived from it is also privileged: see per Cotton, L. J., in *Southwark Water Co.* v. *Quick*, 3 Q. B. D. at p. 321, C. A. See further, *Mayor of Swansea* v. *Quirk*, 5 C. P. D. 106.

Documents.

The old interrogatory as to documents is not now allowed, for an order for discovery of documents is required: *Pitten* v. *Chatterburg*, W. N. 1875, p. 248; but where a party is alleged to have made an insufficient affidavit of documents he may be interrogated: *Jones* v. *Monte Video Gas Co.*, 5 Q. B. D. 556, C. A., see at pp. 558, 559. As to questions as to contents of lost documents, see *Dalrymple* v. *Leslie*, 8 Q. B. D. 5.

R. 6.

Answer by Affidavit.

6. Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as a judge may allow.

Where in an action against a company a member of the company is interrogated, he cannot refuse to file his answer until his taxed costs have been paid: *Berkeley* v. *Standard Discount Co.*, 13 Ch. D. 97, C. A.

R. 7.

Form of answer. (R. S. C., June, 1876, r. 11.)

7. An affidavit in answer to interrogatories shall, unless otherwise ordered by a judge, if exceeding [ten] folios, be printed, and may be in the Form No. 8 in Appendix (B) hereto, with such variations as circumstances may require.

Such affidavits, before the Judicature Acts, were not printed in Common Law actions. In Chancery they were printed by the parties in the form of an answer to the plaintiff's bill, or to the defendant's concise statement and interrogatories; but answers to interrogatories administered in the Chambers of the Equity Judges were not printed.

For the future this, like all other printing, will be done by the parties: R. S. C. (Costs), Orders I. to V., *post*, p. 604, where provisions will be found as to printing, delivery of copies, and costs.

As the rule originally stood three folios was the limit above

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which printing was required. It was raised to ten by the rule noted in the margin.

As to the judge's discretion to dispense with printing, see *Webb* v. *Bornford*, 46 L. J. Ch. 288, V.-C. H.

R. 8. *Objection to answer.*

8. *Any objection to answering any interrogatory may be taken, and the ground thereof stated in the affidavit.*

This rule was repealed by R. S. C., November, 1878, r. 3, and the provisions of r. 5, *ante*, p. 293, were substituted for it: see that rule and note thereto.

Under the annulled rule it was held that where defendants were sued as husband and wife, interrogatories asking them whether they were married need not be answered: *Smith* v. *Berg*, 25 W. R. 606.

R. 9. Sufficiency to answer: how determined.

9. No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court or a judge on motion or summons.

The mode of objecting in Chancery to the sufficiency of an answer to interrogatories has been by exception: see Dan. Ch. Pr. 661, ed. 5. A summary process is substituted by this rule.

See note to next rule.

R. 10. Order for answer or further answer.

10. If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court or a judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further either by affidavit or by vivâ voce examination, as the judge may direct.

As to the former practice in the Common Law Courts, see s. 53 of the C. L. P. Act, 1854. As to the practice in Chancery, see note to the last rule.

Applications under this rule should be by summons at Chambers, not by motion: *Chesterfield Collieries Co.* v. *Black*, 24 W. R. 783, V.-C. H., 13 Ch. D. 138 n.; and the summons should specify the interrogatories or parts of interrogatories to which a further answer is required: *Anstey* v. *North Woolwich Subway Co.*, 11 Ch. D. 439; see too *Church* v. *Perry*, 36 L. T. 513, C. P. D.; *Ashby* v. *Taylor*, 38 L. T. 44, C. A.

As to the modes of enforcing answers to interrogatories, see rule 20, *post*, p. 302.

R. 11. Production of documents.

11. It shall be lawful for the Court or a Judge at any time during the pendency therein of any action or proceeding, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such action or proceeding, as the Court or Judge shall think right; and

the Court may deal with such documents, when produced, in such manner as shall appear just. Order XXXI. r. 11.

The earlier rules of this Order having dealt with the first branch of discovery, that by interrogatories, Rules 11 to 19, proceed to deal with discovery as it affects documents.

The subject obviously embraces two parts: first, discovery simply, that is to say, the power of compelling your opponent to disclose what documents he has in his possession; secondly, the power of compelling their production. The above rule deals with both branches of the subject.

The subject of discovery simply is dealt with in Rules 12 and 13; that of production or inspection of documents, as of right without the intervention of a judge, in Rules 14 to 17; that of production and inspection by order of a judge, in Rules 18 and 19.

Where the issues in an action are sent for trial to an official or special referee the Court or judge has still exclusive jurisdiction over discovery: *Rowcliffe* v. *Leigh*, 4 Ch. D. 661; *Daurillier* v. *Myers*, 17 Ch. D. 346, M. R. Jurisdiction.

Where the object of an action is to obtain possession of a document, there is no power to order it to be delivered up upon an interlocutory application under this rule: *Republic of Costa Rica* v. *Strousberg*, 11 Ch. D. 323, C. A.

An order for discovery of documents, under these rules, may be made against the suppliant in a petition of right: *Tomline* v. *The Queen*, 4 Ex. D. 252, C. A.; against a third party, who has appeared and obtained leave to defend: *MacAllister* v. *Bishop of Rochester*, 5 C. P. D. 194; against the owners of a foreign ship in an Admiralty action, giving them a reasonable time to answer: *The Emma*, 24 W. R. 587, P. D.; in proceedings under the Companies Act, 1862, to strike off a contributory: *Re National Funds Ass. Co.*, 23 W. R. 774, C. A.; against a next friend: *Higginson* v. *Hall*, 10 Ch. D. 235; against the officer of a company designated for that purpose: *Cooke* v. *Oceanic Steam Co.*, W. N., 1875, p. 220; in interpleader, see per Lindley J.: *Phillips* v. *Phillips*, 40 L. T. at p. 821; against a co-defendant: *Hamilton* v. *Nott*, 16 L. R. Eq. 112; but not against the defendant's solicitor: *Cashin* v. *Craddock*, 2 Ch. D. 140. In what proceedings.

In *Fraser* v. *Burrows*, 2 Q. B. D. 624, the Court refused an order to stay an action on a policy until discovery should be made by a person not a party, not within the jurisdiction, and not under the plaintiff's control, although the plaintiff made title through him. But the plaintiff in an insurance case must show that he has done his best to procure the ship's papers: *West of England Bank* v. *Canton Co.*, 2 Ex. D. 462. The old rules as to discovery of ship's papers still apply: see *China Steamship Co.* v. *Commercial Ins. Co.*, W. N., 1881, p. 165, C. A.; and see Form H. 17, *post*, p. 503.

Whether discovery will be ordered before delivery of the statement of defence, which defines the issues between the parties, appears to be a matter of discretion depending on the nature of the particular action. In *Cashin* v. *Cradock*, 2 Ch. D. 140, action for breach of contract and conspiracy; *Hancock* v. *Guerin*, 4 Ex. D. 3, action for commission; and *Davies* v. *Williams*, 13 Ch. 550, action of ejectment, discovery before statement of defence was refused; see too *Phillips* v. *Phillips*, 40 L. T. 815, where discovery in an action of ejectment before statement of claim was refused; but in *Union Bank of London* v. *Manby*, 13 Ch. D. 239, C. A., which was an action for redemption against a mortgagee in pos- Time

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session, production was ordered before defence without any special cause being made out. See too per Baggallay, L. J., in *Republic of Costa Rica* v. *Stronsberg*, 11 Ch. D. at p. 326. Discovery may be ordered after the close of the pleadings: *Anon.* W. N., 1876, p. 11.

Chancery rules.

The Chancery rules relating to discovery and production of documents have superseded the Common Law rules, and now regulate the practice of the High Court: *Bustros* v. *White*, 1 Q. B. D. 423, C. A.; *Anderson* v. *Bank of British Columbia*, 2 Ch. D., pp. 654, 658, C. A.; see, however, per Brett, L. J., in *Parker* v. *Wells*, 18 Ch. D. at p. 485, as to the discretion given by rule 19.

Disclosure.

Discovery must be made of all material documents, though the party making discovery may in certain cases object to produce any document or documents which he enumerates. A document is material which in any way relates to the case of the party seeking discovery: *English* v. *Tottie*, 1 Q. B. D. 141; *Hutchinson* v. *Glover*, 1 Q. B. D. 138. For instance, a defendant in ejectment must make an affidavit of his documents of title: *The New British Investment Co.* v. *Peed*, 3 C. P. D. 196; see too *Phillips* v. *Phillips*, 40 L. T. 815. A document which relates exclusively to the case of the party making discovery is not material: see Wigram on Discovery, pp. 15, 261; *Minet* v. *Morgan*, 8 L. R. Ch. at p. 361.

If the party making discovery objects to produce any document or documents which he has referred to in his affidavit, it is for the judge to determine the validity of the objection under rules 18 and 19. It is a not uncommon practice at Judges' Chambers, by consent, to shew the documents in question to the judge and take his decision thereupon. Where this is done no appeal lies from his order: *Bustros* v. *White*, 1 Q. B. D. 423, C. A.

Production.

The party obtaining discovery is *primâ facie* entitled to inspect all documents which the other party is bound to disclose; for production is a matter of right, not a matter in the discretion of the judge: *Bustros* v. *White*, 1 Q. B. D. 423, C. A.; *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644, C. A.; but there are certain grounds on which the party making discovery may claim exemption from producing the documents.

Documents of title.

The defendant in an action for the recovery of land may, it seems, object to produce his documents of title: *The New British Investment Co.* v. *Peed*, 3 C. P. D. 196; see too *Owen* v. *Wynn*, 9 Ch. D. 29, C. A., as to inspection of Court Rolls, and compare O. XIX., r. 15, as to statement of defence; but see *Lyell* v. *Kennedy*, 30 W. R. 492, C. A. In other cases, it seems, documents of title, if relevant, are not privileged, but their relevancy must clearly appear: *Minet* v. *Morgan*, 8 L. R. Ch. Ap. 361; *Hastings* v. *Ivall*, *ibid.*, 1017: but see *Egremont Burial Board* v. *Egremont Iron Ore Co.*, 14 Ch. D. 158, V.-C. M., and rule 14, *post*.

Criminating documents.

Documents tending to criminate the party discovering them may possibly be privileged from production, but the objection must be taken specifically and on oath: *Webb* v. *East*, 5 Ex. D. 23 and 108, C. A.

Prolonged communications.

Communications between solicitor and client are privileged from production: see for instance *Taylor* v. *Batten*, 4 Q. B. D. 85, C. A.; and the privilege extends to communications made by third parties to, or for the purpose of submission to, the solicitor, provided the communications are made with reference to actual or impending litigation: see the principle explained per Jessel, M. R., in *Wheeler* v. *Le Marchant*, 17 Ch. D., at pp. 681, 682, and

by Brett, L. J., in *Southwark Water Co.* v. *Quick*, 3 Q. B. D., at p. 320, C. A.

The following are privileged, namely: Reports of medical men procured by solicitor for purposes of an action: *Friend* v. *London, Chatham & Dover Ry.*, 2 Ex. D. 437, C. A.; reports and documents relating to impending litigation prepared for purpose of submission to solicitor whether actually submitted or not: *Southwark Water Co.* v. *Quick*, 3 Q. B. D. 315, C. A.; survey of a ship made for purpose of action: *The Theodor Korner*, 3 P. D. 162; but see *Martin* v. *Butchard*, 36 L. T. 732, C. P. D.; see, too, *Nordon* v. *Defries*, 8 Q. B. D. 508, as to shorthand notes in previous action. Privilege.

A document once privileged is always privileged, as for instance in future litigation: *Bullock* v. *Corrie*, 3 Q. B. D. 356. Compare *Brandford* v. *Brandford*, 4 P. D. 72.

The following are not privileged, namely: letters from non-legal agent giving opinion on subject of litigation: *Bustros* v. *White*, 1 Q. B. D. 423, C. A.; confidential communications to solicitor in the action, but not made at his request: *M'Corquodale* v. *Bell*, 1 C. P. D. 471; agreement of compromise between defendant and third party relating to subject-matter of action: *Hutchinson* v. *Glover*, 1 Q. B. D. 138; correspondence between vendor and the person from whom he purchased, in an action by vendee for non-delivery: *English* v. *Tottie*, 1 Q. B. D. 141; reports by mercantile agent to principal on subject-matter of threatened litigation: *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644, C. A.; reports to solicitor procured by him before litigation was in contemplation: *Wheeler* v. *Le Marchant*, 17 Ch. D. 675, C. A.

Official documents may be privileged from production on grounds of public policy, but the objection it seems must be taken on oath by some responsible official: *Kain* v. *Farrer*, 37 L. T. 469, C. P. D.; *H. M. S. Bellerophon*, 44 L. J. Adm. 5. Official documents.

Communications between a Pursuivant of the Heralds' College and his employer are not privileged: *Slade* v. *Tucker*, 14 Ch. D. 824.

If irrelevant documents are disclosed, it seems that they need not be produced for inspection: *Wilson* v. *Thornbury*, 17 L. R. Eq. 517. Irrelevant documents.

R. 12. 12. Any party may, without filing any affidavit, apply to a judge for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession, or power, relating to any matter in question in the action. Order for discovery.

In the Common Law Courts discovery depended upon s. 50 of the C. L. P. Act, 1854. That section gave the right to discovery, but only upon an affidavit tracing some one document, to the production of which the applicant was entitled, into the possession or power of the opposite party. This often gave rise to difficulty. It was customary to evade the difficulty by inserting a question as to documents in interrogatories delivered under the 51st section. This practice is not now allowed: *Pitten* v. *Chatterburg*, W. N. 1875, p. 248, Quain, J., at Chambers. The above rule dispenses with any affidavit.

Discovery must be made of all documents relevant to the case of the party seeking it, see note to last rule; but the party making discovery may under the next rule object in his affidavit to producing the documents he has disclosed.

R. 13. 13. The affidavit to be made by a party against whom such order as is mentioned in the last preceding Rule has Affidavit of discovery

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been made, shall specify which, if any, of the documents therein mentioned he objects to produce, and it may be in the Form No. 9 in Appendix (B) hereto, with such variations as circumstances may require.

For such form, see *post*, p. 477, No. 9.

The form provided is the same which has been in use in the Court of Chancery under the Judges' Regulations of 8th Aug., 1857, and Sched. No. 3; Morgan's Acts and Orders, Appx. p. lix., ed. 4; Forms to Dan. Ch. Pr., No. 1934, ed. 2. For the practice in Chancery before the Judicature Acts, see Dan. Ch. Pr., pp. 1673, *et seq.*, ed. 5. As to the existing practice in the Chancery Division, see Seton on Decrees, pp. 133, *et seq.*, ed. 4.

The affidavit under this rule is conclusive, unless it appears from the affidavit itself or the documents referred to therein, or from admissions in the pleadings, that the affidavit is insufficient: *Welsh Steam Collieries Co.* v. *Gaskell*, 36 L. T. 352, C. A.; *Jones* v. *Monte Video Gas Co.*, 5 Q. B. D. 556, C. A. If the party seeking discovery is dissatisfied with the affidavit his remedy is to interrogate, not to apply for a further affidavit: *Jones* v. *Monte Video Gas Co.*, *ubi supra*.

Where a party objects to produce documents which he has disclosed he must in his affidavit specify the grounds on which he claims exemption, and identify the documents for which he asserts this privilege: *Gardner* v. *Irvin*, 4 Ex. D. 49, C. A.; see too *Webb* v. *East*, 5 Ex. D. 108, C. A.

In *Taylor* v. *Batten*, 4 Q. B. D. 85, C. A., privileged documents described in the affidavit as "certain documents and letters which have passed between my legal advisers and myself, which are numbered 50 to 76 inclusive, and are tied up in a bundle marked with the letter A, and initialled by me," were held to be sufficiently identified. See further as to privileged documents of title, *Taylor* v. *Oliver*, 45 L. J. Ch. 774; *Owen* v. *Wynn*, 9 Ch. D. 29, C. A., at p. 30.

Place.

As to the discretion of the judge as to the place where documents are to be produced for inspection, see *Bustros* v. *Bustros*, 30 W. R. 374, C. A.

R. 14.

Notice to produce documents referred to in pleadings or affidavits. Effect of non-compliance.

14. Every party to an action or other proceeding shall be entitled, at any time before or at the hearing thereof, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such action or proceeding, unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the action, or that he had some other sufficient cause for not complying with such notice.

See as to "sufficient cause," *Webster* v. *Whewell*, 15 Ch. D. 120.

15. Notice to any party to produce any documents referred to in his pleading or affidavits shall be in the Form No. 10 in Appendix (B) hereto. R. 15. Form of notice.

For such form, see *post*, p. 478, No. 10.

By R. S. C. (Costs), *post*, p. 628, r. 15, no costs of a notice or inspection under r. 14 are to be allowed, unless it is shown to the satisfaction of the taxing officer that there was good reason for it.

16. The party to whom such notice is given shall, within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in Rule 13, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice may be in the Form No. 11 in Appendix (B) hereto, with such variations as circumstances may require. R. 16. Production on notice.

For such form, see *post*, p. 479, B., No. 11. As to the costs of production and inspection, see *Brown* v. *Sewell*, 16 Ch. D. 517, C. A.

17. If the party served with notice under Rule 15 omits to give such notice of a time for inspection, or objects to give inspection, the party desiring it may apply to a judge for an order for inspection. R. 17. Order for production of such documents.

See *Re Credit Co.*, 11 Ch. D. 256, where the proper notice had not been given.

18. Every application for an order for inspection of documents shall be to a judge. And except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. R. 18. Application for inspection.

Courts of Equity always compelled the production of documents. The Common Law Courts did so to a very limited extent at common law, but mainly under 14 & 15 Vict. c. 99, s. 6. As to

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what documents any party is entitled to inspect, see note to r. 11, *ante*, p. 296.

By s. 66 of the Act of 1873, *ante*, p. 68, it may be ordered that books or documents be produced at the office of any district registry.

As to the mode of taking copies of documents, and the costs to be paid, see R. S. C. (Costs), *post*, p. 628, r. 16.

As to the discretion vested in the judge by this rule and the next, see per Brett, L. J., in *Parker* v. *Wells*, 18 Ch. D. at p. 485. Where parties by consent show documents to the judge and take his opinion as to whether they should be produced, it seems no appeal lies from his decision on the point: *Bustros* v. *White*, 1 Q. B. D. 423, C. A.

As the affidavit of documents under r. 14 is conclusive, it seems that the latter part of the rule must refer to applications to inspect where no affidavit of documents has been filed.

R. 19.

Decision of question on which right to discovery depends.

19. If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court or a judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute in the action should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

It often happens that one party to an action alleges some fact, such as partnership or agency, for example, which the other denies. If the fact alleged were admitted to be true, it would clearly entitle the party alleging it to discovery. If it were admitted to be untrue, he would as clearly be disentitled to it. By dealing with the question of discovery either way before the other question, on the solution of which the right to discovery really depends, injustice may be done. The difficulty was felt both by Common Law and Equity Judges. Compare O. XXXVI., r. 6, *post*, p. 321. For instances in which this rule has been acted upon, see *Wood* v. *Anglo-Italian Bank*, 34 L. T. 255, C. P. D.; *Re Leigh, Rowcliffe* v. *Leigh*, L. R. 6 Ch. D. 256, C. A.

R. 20.

Disobedience to order.

Consequences.

20. If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court or a judge for an order to that effect, and an order may be made accordingly.

The ordinary method of enforcing an order for discovery was by attachment; but to procure an attachment is often tedious, troublesome, and expensive, and not always efficacious. In the Common Law Courts, the want of some readier method of compulsion was much felt. In the case of plaintiffs, the Court would stay proceedings till they answered; but there was no corre-

spending method of dealing with defendants. The present rule affords an easy method of compulsion. Order XXXI. rr. 20—23.

It is in the discretion of the Court whether this power should in each case be exercised: *Hartley* v. *Owen*, 34 L. T. 752, V.-C. H. It will commonly only be exercised in the last resort: *Twycross* v. *Grant*, W. N. 1875, pp. 201, 225, Lush, J., at Chambers; *Anon.*, *Ibid.*, 202, Lush, J., at Chambers.

As to enlarging the time when an action has been dismissed under this rule, see *Carter* v. *Stubbs*, 6 Q. B. D. 116, C. A.

21. Service of an order for discovery or inspection made against any party on his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order. R. 21. Service of order. Attachment.

As to indorsing the order for service in the Chancery Division, see *Thomas* v. *Palin*, W. N. 1882, p. 73.

22. A solicitor upon whom an order against any party for discovery or inspection is served under the last Rule, who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment. R. 22. Duty of solicitor served with order.

23. Any party may, at the trial of an action or issue, use in evidence any one or more of the answers of the opposite party to interrogatories without putting in the others: Provided always, that in such case the Judge may look at the whole of the answers, and if he shall be of opinion that any other of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in. R. 23. Use of answer at trial.

In the Common Law Courts, no one was able to use any answer of his opponent to interrogatories without using all of them. The consequence was that what might be one of the great uses of interrogatories, viz., the saving of expense by proving by admission the facts not really in dispute, was prevented: for the answers containing such admissions stood side by side with others, which the party who had interrogated could not safely make a part of his case.

ORDER XXXII. Order XXXII.

ADMISSIONS.

1. Any party to an action may give notice, by his own statement or otherwise, that he admits the truth of the whole or any part of the case stated or referred to in the statement of claim, defence, or reply of any other party. R. 1. Notice of admission of case in pleadings.

Order XXXII. rr. 1—4.

In the first report of the Judicature Commission, p. 14, the Commissioners say: "We think that a similar practice [to that as to admission of documents] might with advantage be extended to the admission of certain facts as well as documents; and therefore we recommend that if it be made to appear to the judge, at or before the trial of any case, that one of the parties was, a reasonable time before the trial, required in writing to admit any specific fact, and without reasonable cause refused to do so, the judge should either disallow to such party, or order him to pay (as the case may be), the costs incurred in consequence of such refusal." The present rule does not carry out this recommendation. It allows parties to make admissions of facts, but it does not apply to facts generally the system of notice to admit, embodied, as to documents, in the following rules.

As to admissions on the pleadings where the allegations of the opposite party are not specifically denied, see O. XIX. r. 17, *ante*, p. 258.

R. 2. Notice to admit documents.

2. Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the action may be, unless at the hearing or trial the Court certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense.

This and the two following rules correspond to ss. 117 and 118 of the C. L. P. Act, 1852, and Rule 29 of R. G., H. T. 1853; and as to Chancery, to s. 7, of 21 & 22 Vict. c. 27, and Chan. Cons. Ord. XLI., Rule 39, and Sched. N. No. 6.

R. 3. Form of notice.

3. A notice to admit documents may be in the Form No. 12 in Appendix (B) hereto.

For such form, see *post*, p. 479, No. 12.

R. 4. Affidavit of signature.

4. An affidavit of the solicitor or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents, and annexed to the affidavit, shall be sufficient evidence of such admissions.

The rules contain no provisions as to the ordinary notice to produce documents at the trial, but a form of such notice is given: see App. (B.) No. 10*a*, at *post*, p. 478.

ORDER XXXIII.

Order XXXIII.

INQUIRIES AND ACCOUNTS.

At what stage directed.

The Court or a Judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

As to the various modes in which questions in an action may be tried, see O. XXXVI., r. 2, *post*, p. 317, and notes thereto. See, too, *Turquand* v. *Wilson*, 1 Ch. D. 85, V.-C. H.; *Rolfe* v. *Maclaren*, 3 Ch. D. 106, V.-C. H.; *Rumsey* v. *Reade*, 1 Ch. D. 643, V.-C. B. See also O. XL., r. 11, *post*, p. 359.

By s. 66 of the Act of 1873, *ante*, p. 68 :—

[It shall be lawful for the Court, or any judge of the division to which any cause or matter pending in the said High Court is assigned, if it shall be thought fit, to order that any books or documents may be produced, or any accounts taken or inquiries made, in the office of or by any such district registrar as aforesaid; and in any such case the district registrar shall proceed to carry all such directions into effect in the manner prescribed; and in any case in which any such accounts or inquiries shall have been directed to be taken or made by any district registrar, the report in writing of such district registrar as to the result of such accounts or inquiries may be acted upon by the Court, as to the Court shall seem fit.]

Accounts cannot be taken in a district registry except in pursuance of an order of the Court or judge under this section: *Irlam* v. *Irlam*, 2 Ch. D. 608, V.-C. H.; *Re Smith's Estate*, *Hutchinson* v. *Ward*, 6 Ch. D. 692, V.-C. H. See also *Walker* v. *Robinson*, 24 W. R. 427, V.-C. B; *Brassington* v. *Cussons*, 24 W. R. 881, V.-C. H. For inquiries directed to be made into matters at issue before hearing, see *West London Dairy Co.* v. *Abbot*, 44 L. T. 376. For an inquiry as to the sums due for repairs in an action for necessaries against a ship, see *The Sally*, 48 L. J. P. D. 56.

As to accounts generally, see *Seton*, 4th ed. pp. 771 *et seq.* For an order directing fresh matters to be included in an account which had been directed to be taken, see *Barber* v. *Mackrell*, 12 Ch. D. 534, C.A. As to liberty to surcharge and falsify where a single error in an account is established, see *Gething* v. *Keighley*, 9 Ch. D. 547, M.R.

Order XXXIV.

ORDER XXXIV.

QUESTIONS OF LAW.

R. 1. Special case by consent. Form. Documents. Inference of fact.

1. The parties may, after the writ of summons has been issued, concur in stating the questions of law arising in the action in the form of a special case for the opinion of the Court. Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the questions raised thereby. Upon the argument of such case the Court and the parties shall be at liberty to refer to the whole contents of such documents, and the Court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial.

The power of stating a special case in the Common Law Courts depended upon 3 & 4 Will. 4, c. 42, s. 25, and ss. 46, 47, and 179 of the C. L. P. Act, 1852. This right was constantly exercised: the ordinary practice being, that if the parties could not agree upon the statement of the case, it was settled by an arbitrator. In Chancery, the power to proceed by special case depended on 13 & 14 Vict. c. 35.

The provision enabling the Court to refer to documents is new in the Common Law Courts. Formerly the Court was confined within the four corners of the case, so that it was often necessary to set out in the case, or by way of appendix to the case, documents, only a part of which was likely to prove material. The power to draw inferences of fact also did not exist in Common Law Courts as of right; though it was commonly specially reserved to the Court in well-drawn cases. In cases stated in the Court of Chancery, the Court had both these powers, under ss. 8 and 14 of 13 & 14 Vict. c. 35.

A special case must be upon a real state of facts, not a hypothetical: *Republic of Bolivia* v. *Bolivian Navigation Co.*, 24 W. R. 361, M. R.

Issues of fact.

There is nothing in the rules corresponding to the powers given by ss. 42—45 of the C. L. P. Act, 1852. Those sections enabled the parties to an action, by consent and with the leave of a judge, to state issues of fact without pleadings and to go down to trial on them. Presumably that procedure might still be adopted if desired.

R. 2. Preliminary question of law.

2. If it appear to the Court or a judge, either from the statement of claim or defence or reply or otherwise, that there is in any action a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a referee or an arbitrator, the

Order XXXIV. rr. 2—5.

Special case without consent.

Court or judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court or judge may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed.

The last rule enables the parties to state a case by consent. The present rule enables a judge to raise a question of law by special case or otherwise, without reference to consent.

This rule is not limited in its application to cases in which the point of law is made to appear by the pleadings. The Court may look at the circumstances, whether brought to its knowledge by pleadings, affidavit, or otherwise: *Metropolitan Board* v. *New River Co.*, 1 Q. B. D. 727; 2 Q. B. D. 67, C. A. Hence, an order may be made after writ and before statement of claim: *Ibid.* The Court of Appeal will not interfere with the discretion of the Court below, except in a very strong case: *Ibid.*

By analogy to this rule the Court will at the trial try first a question of law, if its decision may dispense with the trial of questions of fact: *Pooley* v. *Driver*, 5 Ch. D. 458, M. R. See O. XXXVI. r. 6, *post*, p. 321, which supplements the present rule by providing for the trial of different questions of fact in an action in different modes and in the order which the Court may direct.

R. 3. Printing case.

3. Every special case shall be printed by the plaintiff, and signed by the several parties or their solicitors, and shall be filed by the plaintiff. Printed copies for the use of the judges shall be delivered by the plaintiff.

Special cases in the Common Law Courts have not necessarily been printed hitherto. As to printing, delivery of copies, and costs, see R. S. C. (Costs), Order V., *post*, p. 605.

R. 4. Persons under disability

4. No special case in an action to which a married woman, infant, or person of unsound mind is a party shall be set down for argument without leave of the Court or a judge, the application for which must be supported by sufficient evidence that the statements contained in such special case, so far as the same affect the interest of such married woman, infant, or person of unsound mind, are true.

R. 5. Entry for argument.

5. Either party may enter a special case for argument by delivering to the proper officer a memorandum of entry, in the Form No. 13 Appendix (B) hereto, and also if any married woman, infant, or person of unsound mind be a party to the action, producing a copy of the order giving leave to enter the same for argument.

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For such form, see *post*, p. 480, No. 13.

A special case must be argued before a single Judge, unless all parties agree otherwise: in which case it will be heard before a Divisional Court: Act of 1876, s. 17, *post*, p. 136; O. LVIIa., r. 1, *post*, p. 415.

R. 6. Agreement as to payment of money and costs. (R. S. C., April, 1880, r. 9.)

6. The parties to a special case may, if they think fit, enter into an agreement in writing, which shall not be subject to any stamp duty, that on the judgment of the Court being given in the affirmative or negative of the question or questions of law raised by the special case, a sum of money, fixed by the parties, or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, either with or without costs of the action, and the judgment of the Court may be entered for the sum so agreed or ascertained, with or without costs, as the case may be, and execution may issue upon such judgment forthwith, unless otherwise agreed, or unless stayed on appeal.

When the procedure indicated by this rule is not adopted, but the action is disposed of by the answer of the Court to the questions proposed by the case, the proper course seems to be to take the answers as declarations by the Court and to move for judgment thereon: *Harrison* v. *Cornwall Minerals Ry. Co.*, 16 Ch. D. 66. As to appeals from orders on special cases, see note to s. 19 of the Act of 1873, *ante*, p. 14.

R. 7. Application of order. (R. S. C., April, 1880, r. 10.)

7. This Order shall apply to every special case stated in an action, or in any proceeding incidental to an action. No special case shall hereafter be stated under the Act 13 & 14 Vict. c. 35.

By O. LXII., r. 3, *post*, p. 443, the parties to any civil proceeding on the Crown side of the Queen's Bench Division or to any revenue proceeding may concur in stating a special case, to which the provisions of this order are to apply.

Order XXXV.

ORDER XXXV.

PROCEEDINGS IN DISTRICT REGISTRIES.

R. 1. *Actions in District Registry.*

1. *Where an action proceeds in the District Registry all proceedings, except where by these Rules it is otherwise provided, or the Court or a judge shall otherwise order, shall be taken in the District Registry, down to and including the entry for trial of the action or issues therein;*

or if the plaintiff is entitled to enter final judgment or to obtain an order for an account by reason of the default of the defendant, then down to and including such judgment or order; and such judgment or order as last aforesaid shall be entered in the District Registry in the proper book, in the same manner as a like judgment or order in an action proceeding in London would be entered in London. Where the writ of summons is issued out of a District Registry and the plaintiff is entitled to enter interlocutory judgment under Order XIII., Rule 6, or where the action proceeds in the District Registry and the plaintiff is entitled to enter interlocutory judgment under Order XXIX., Rule 4 or 5, in either case such interlocutory judgment, and, when damages shall have been assessed, final judgment shall be entered in the District Registry, unless the Court or a judge shall otherwise order.

Where an action proceeds in the District Registry, final judgment shall be entered in the District Registry, unless the judge at the trial or the Court or a judge shall otherwise order.

This rule was annulled by R. S. C., June, 1876, r. 12, and the following substituted :—

R. 1a. Action in District Registry. Judgment in Registry. (R. S. C., June, 1876, r. 12.)

1a. Where an action proceeds in the District Registry all proceedings, except where by any of the Rules of the Supreme Court it is otherwise provided, or the Court or a judge shall otherwise order, shall be taken in the District Registry, down to and including final judgment, and every final judgment and every order for an account by reason of the default of the defendant or by consent shall be entered in the District Registry in the proper book, in the same manner as a like judgment or order in an action proceeding in London would be entered in London.

Where the writ of summons is issued out of a District Registry and the plaintiff is entitled to enter interlocutory judgment under Order XIII., Rule 6, or where the action proceeds in the District Registry and the plaintiff is entitled to enter interlocutory judgment under Order XXIX., Rule 4 or 5, in either case such interlocutory judgment, and when damages shall have been assessed, final judgment shall be entered in the District Registry, unless the Court or judge shall otherwise order.

Where an action proceeds in the District Registry, final judgment shall be entered in such Registry, unless the judge at the trial or the Court or a judge shall otherwise order.

Actions in the Queen's Bench, Common Pleas, and

Order XXXV. rr. 1a, 1b. *Exchequer Divisions shall be entered for trial with the Associates and not in the District Registries.*

R. 1b. (R. S. C., Decr., 1879, r. 3.)

So much of Order 35, Rule 1a, as directs that actions in the Queen's Bench, Common Pleas, and Exchequer Divisions shall not be entered for trial in the District Registries is hereby repealed.

See O. XXXVI. r. 15a, *post*, p. 323, which is substituted for the repealed provision.

The Act of 1873 enacts as follows :—

Establishment of District Registries.

[S. 60. And whereas it is expedient to facilitate the prosecution in country districts of such proceedings as may be more speedily, cheaply, and conveniently carried on therein; it shall be lawful for Her Majesty, by Order in Council, from time to time to direct that there shall be District Registrars in such places as shall be in such order mentioned for Districts to be thereby defined, from which writs of summons for the commencement of actions in the High Court of Justice may be issued, and in which such proceedings may be taken and recorded as are hereinafter mentioned; and Her Majesty may thereby appoint that any Registrar of any County Court, or any Registrar or Prothonotary or District Prothonotary of any local Court whose jurisdiction is hereby transferred to the said High Court of Justice, or from which an appeal is hereby given to the said Court of Appeal, or any person who, having been a District Registrar of the Court of Probate, or of the Admiralty Court, shall under this Act become and be a District Registrar of the said High Court of Justice, or who shall hereafter be appointed such District Registrar, shall and may be a District Registrar of the said High Court for the purpose of issuing such writs as aforesaid, and having such proceedings taken before him as are hereinafter mentioned. This section shall come into operation immediately upon the passing of this Act.]

S. 13 of the Act of 1875 amends this section by adding :—

Appointment of District Registrars.

[Where any such order has been made, two persons may, if required, be appointed to perform the Duties of District Registrar in any District named in the order, and such persons shall be deemed to be joint District Registrars, and shall perform the said duties in such manner as may from time to time be directed by the said Order

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or any Order in Council amending the same. Moreover, the Registrar of any inferior Court of Record having jurisdiction in any part of any District defined by such order (other than a County Court) shall, if appointed by Her Majesty, be qualified to be a District Registrar for the said District, or for any and such part thereof as may be directed by such order, or any order amending the same. Every District Registrar shall be deemed to be an officer of the Supreme Court, and be subject accordingly to the jurisdiction of such Court, and of the divisions thereof.]

Seals of District Registrars.

[S. 61. In every such District Registry such seal shall be used as the Lord Chancellor shall from time to time, either before or after the time fixed for the commencement of this Act, direct, which seal shall be impressed on every writ and other document issued out of or filed in such District Registry, and all such writs and documents, and all exemplifications and copies thereof, purporting to be sealed with the seal of any such District Registry, shall in all parts of the United Kingdom be received in evidence without further proof thereof.]

Powers of District Registrars.

[S. 62. All such District Registrars shall have power to administer oaths and perform such other duties in respect of any proceedings pending in the said High Court of Justice or in the said Court of Appeal as may be assigned to them from time to time by Rules of Court, or by any special order of the Court.]

Proceedings to be taken in District Registries.

[S. 64. Subject to the Rules of Court in force for the time being, writs of summons for the commencement of actions in the High Court of Justice shall be issued by the District Registrars when thereunto required; and unless any order to the contrary shall be made by the High Court of Justice, or by any judge thereof, all such further proceedings, including proceedings for the arrest or detention of a ship, her tackle, apparel, furniture, cargo, or freight, as may and ought to be taken by the respective parties to such action in the said High Court down to and including entry for trial, or (if the plaintiff is entitled to sign final judgment or to obtain an order for an account by reason of the non-appearance of the defendant) down to and including final judgment, or an order for an account, may be taken before the District Registrar, and recorded in the District Registry, in such manner as may be pre-

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scribed by Rules of Court; and all such other proceedings in any such action as may be prescribed by Rules of Court shall be taken and if necessary may be recorded in the same District Registry.]

Accounts, inquiries, and production of documents in District Registries.

[S. 66. It shall be lawful for the Court, or any judge of the division to which any cause or matter pending in the said High Court is assigned, if it shall be thought fit, to order that any books or documents may be produced, or any accounts taken or inquiries made, in the office of or by any such District Registrar as aforesaid; and in any such case the District Registrar shall proceed to carry all such directions into effect in the manner prescribed; and in any case in which any such accounts or inquiries shall have been directed to be taken or made by any District Registrar, the report in writing of such District Registrar as to the result of such accounts or inquiries may be acted upon by the Court, as to the Court shall seem fit.]

S. 22 of the Act of 1876, *ante*, p. 139, provides for the appointment of deputies by district registrars.

As to the districts of district registrars, see Order in Council, 12th Aug., 1875, *post*, p. 687.

As to when an action is to proceed in the district registry, see O. V., r. 1, *ante*, p. 119, and notes thereto, and O. XII., *ante*, p. 210, where see also as to the issue of writs and the entry of appearances in district registries.

As to the taking of accounts in district registries, see the last Order, and notes thereto.

As to costs of proceedings in district registries, see R. S. C. (Costs), *post*, p. 633, r. 34.

A district registrar has no power to make a decree for administration on an administration summons: *Irlam* v. *Irlam*, 2 Ch. D. 608, V.-C. H.; nor can he appoint a receiver, or direct a banking account to be opened: *Re Smith*, *Hutchinson* v. *Ward*, 6 Ch. D. 692, V.-C. H.

Where an action is commenced in a district registry, and a receiver is appointed by a judge in London, the receiver may be ordered to pass his accounts in the district registry: *Robertson* v. *Capper*, 26 W. R. 434. In a partition action the usual inquiries may be made in the district registry, but application for a sale must be made in London: *Sykes* v. *Schofield*, 14 Ch. D. 629.

As to the effect of an order made by a judge in an action commenced in a district registry in removing such action, see *Dyson* v. *Pickles*, 27 W. R. 376, M. R.

As to paying money into court in district registries, see *Finlay* v. *Davies*, 12 Ch. D. 735.

It is in the discretion of the Court to direct a sale of land to take place in the district registry or in London, and the Court of Appeal will not review that discretion: *Macdonald* v. *Foster*, 6 Ch. D. 193, C. A.

It has been laid down by Hall, V.-C., that taxation of costs should take place in the registry only in simple cases: *Day* v. *Whittaker*, 6 Ch. D. 734, V.-C. H.

2. Subject to the foregoing rules, where an action proceeds in the District Registry the judgment and all such orders therein as require to be entered, except orders made by the District Registrar under the authority and jurisdiction vested in him under these Rules, shall be entered in London, and an office copy of every judgment and order so entered shall be transmitted to the District Registry to be filed with the proceedings in the action. R. 2. Judgment in London.

See note to last rule.

3. Where an action proceeds in the District Registry all writs of execution for enforcing any judgment or order therein shall issue from the District Registry, unless the Court or a Judge shall otherwise direct. Where final judgment is entered in the District Registry costs shall be taxed in such Registry unless the Court or a Judge shall otherwise order. R. 3. Writs of execution. Taxation of costs.

See note to r. 1a, *ante*, p. 312.

3a. Where an action proceeds in a District Registry, all proceedings relating to the following matters, namely,— R. 3a. Proceedings necessary or incidental to judgment. (R. S. C., April 1880, r. 11.)

(*a*.) Leave to issue or renew writs of execution.
(*b*.) Examination of judgment debtors for garnishee purposes.
(*c*.) Garnishee orders.
(*d*.) Charging orders nisi.

shall, unless the Court or a Judge otherwise order, be taken in the District Registry.

4. Where an action proceeds in a District Registry the District Registrar may exercise all such authority and jurisdiction in respect of the action as may be exercised by a Judge at chambers, except such as by these Rules a Master of the Queen's Bench, Common Pleas, or Exchequer Divisions is precluded from exercising. R. 4. Powers of District Registrar.

As to the jurisdiction of a master at chambers, see O. LIV., r. 2, *post*, p. 401.

5. Every application to a District Registrar shall be made in the same manner in which applications at chambers are directed to be made by these Rules. R. 5. Mode of application.

See Order LIV., *post*, p. 401.

6. If any matter appears to the District Registrar proper for the decision of a Judge, the Registrar may refer R. 6. Reference to a judge.

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the same to a Judge, and the Judge may either dispose of the matter or refer the same back to the Registrar with such directions as he may think fit.

This and the three following rules assimilate, in the matters to which they refer, proceedings before a district registrar and before a master. See O. LIV., rr. 3, 4, 5, *post*, p. 403.

R. 7. Appeal to Judge.

7. Any person affected by any order or decision of a District Registrar may appeal to a judge. Such appeal may be made notwithstanding that the order or decision was in respect of a proceeding or matter as to which the District Registrar had jurisdiction only by consent. Such appeal shall be by summons within four days after the decision complained of, or such further time as may be allowed by a Judge or the Registrar.

R. 8. Stay of proceedings.

8. An appeal from a District Registrar shall be no stay of proceedings unless so ordered by a Judge or the Registrar.

R. 9. Control of Court or a Judge.

9. Every District Registrar and other officer of a District Registry shall be subject to the orders and directions of the Court or a Judge as fully as any other officer of the Court; and every proceeding in a District Registry shall be subject to the control of the Court or a judge, as fully as a like proceeding in London.

R. 10. What Judge of Chancery division.

10. Every reference to a judge by or appeal to a judge from a District Registrar in any action in the Chancery Division shall be to the judge to whom the action is assigned.

R. 11. Removal of action by defendant to London.

11. In any action which would, under the foregoing Rules, proceed in the District Registry, any defendant may remove the action from the District Registry as of right in the cases, and within the times, following:

Where the writ is specially indorsed under Order III., Rule 6, and the plaintiff does not within four days after the appearance of such defendant give notice of an application for an order against him under Order XIV.: then such defendant may remove the action as of right at any time after the expiration of such four days, and before delivering a defence, and before the expiration of the time for doing so:

Where the writ is specially indorsed and the plaintiff has made such application as in the last paragraph mentioned, and the defendant has obtained leave to

defend in manner provided by Order XIV.: then such defendant may remove the action as of right at any time after the order giving him leave to defend, and before delivering a defence and before the expiration of the time for doing so:

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Where the writ is not specially indorsed any defendant may remove the action as of right at any time after appearance, and before delivering a defence, and before the expiration of the time for doing so.

R. 11a. Admiralty action. (R. S. C., Dec. 1875, r. 10.)

11a. In an Admiralty action in rem any person who may have duly intervened and appeared may remove an action from a District Registry as of right.

R. 12. Mode of removal.

12. Any defendant desirous to remove an action as of right under the last preceding Rule may do so by serving upon the other parties to the action, and delivering to the District Registrar, a notice, signed by himself or his solicitor, to the effect that he desires the action to be removed to London, and the action shall be removed accordingly: Provided, that if the Court or a judge shall be satisfied that the defendant giving such notice is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, such Court or judge may order that the action may proceed in the District Registry notwithstanding such notice.

R. 13. Removal on application of any party to or from London.

13. In any case not provided for by the last two preceding Rules, any party to an action proceeding in a District Registry may apply to the Court or a judge, or to the District Registrar, for an order to remove the action from the District Registry to London, and such Court, judge, or registrar, may make an order accordingly, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall seem just. Any party to an action proceeding in London may apply to the Court or a judge for an order to remove the action from London to any District Registry, and such Court or judge may make an order accordingly, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall seem just.

By the Act of 1873:—

[S. 65. Any party to an action in which a writ of summons shall have been issued from any such District Registry shall be at liberty at any time to apply, in such manner as shall be prescribed by Rules of Court, to the

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High Court, or to a judge in chambers of the division of the said High Court to which the action may be assigned, to remove the proceedings from such District Registry into the proper office of the said High Court; and the Court or judge may, if it be thought fit, grant such application, and in such case the proceedings and such original documents, if any, as may be filed therein shall upon receipt of such order be transmitted by the District Registrar to the proper office of the said High Court, and the said action shall thenceforth proceed in the said High Court in the same manner as if it had been originally commenced by a writ of summons issued out of the proper office in London; or the Court or judge, if it be thought right, may thereupon direct that the proceedings may continue to be taken in such District Registry.]

The power to remove as of right given by Rule 11 is limited to defendants, and can only be exercised within the periods defined. The power given by this section to apply to a judge, and by the above Rule 13 to apply to the district registrar, for an order of removal is general.

R. 14. Transmission of documents on removal.

14. Whenever any proceedings are removed from the District Registry to London, the District Registrar shall transmit to the proper officer of the High Court of Justice all original documents (if any) filed in the District Registry, and a copy of all entries in the books of the District Registry of the proceedings in the action.

R. 15. District Registrars to account. (R. S. C., Dec. 1875, r. 11.)

15. Every District Registrar shall account for and pay over to the Treasury all moneys paid into Court at the Registry of which he is Registrar, in such manner and at such times as may be from time to time directed by the Treasury.

R. 16. Application of rules of April, 1880. (R. S. C., May, 1880, r. 13).

16. (*a.*) So much of Order XXXVII., Rule 3*d*, as requires affidavits to be filed in the central office shall not apply to affidavits required to be filed in a District Registry.

(*b.*) Order LIV., Rules 7 to 14, both inclusive, shall not apply to proceedings in District Registries.

(*c.*) The forms contained in the schedule to the Rules of the Supreme Court, April, 1880, may, as far as they are applicable, be used in or for the purposes of District Registries, with such variations as circumstances require.

ORDER XXXVI.

Order XXXVI.

TRIAL.

R. 1. Venue abolished. Place of trial

1. There shall be no local venue for the trial of any action, but when the plaintiff proposes to have the action tried elsewhere than in Middlesex, he shall in his statement of claim name the county or place in which he proposes that the action shall be tried, and the action shall, unless a judge otherwise orders, be tried in the county or place so named. Where no place of trial is named in the statement of claim, the place of trial shall, unless a judge otherwise orders, be the county of Middlesex. Any order of a judge, as to such place of trial, may be discharged or varied by a Divisional Court of the High Court.

Common Law actions were formerly either local: in which the venue could only be laid in the county in which the cause of action arose, though the trial might be ordered to take place elsewhere: Chitty's Archbold, p. 308, ed. 12; or transitory: in which the plaintiff might lay his venue where he pleased, subject to the power of the Court or a judge to order it to be changed.

The practice as to changing the venue was, that either party might apply for an order for that purpose. The plaintiff, if the application was his, must have shown reasonable ground for the change: Chitty's Archbold, p. 1355, ed. 12. If the application was the defendant's, he had to show distinctly a preponderance of convenience in favour of trying where he proposed, instead of where the venue was laid: *Church* v *Barnett*, L. R. 6 C. P. 116. See the cases fully collected in Day's C. L. P. Acts, pp. 93, *et seq.*, ed. 4.

The words of the above rule seem to leave the matter in the discretion of the judge, to be exercised according to the balance of convenience.

This rule, it will be observed, is general, and enables the plaintiff in any action to name a place of trial in his statement of claim. It includes, therefore, Probate actions: *Ridge* v. *Ridge*, 35 L. T. 428, P. D.; and Chancery actions, *Redmayne* v. *Vaughan*, 24 W. R. 983.

R. 2. Mode of trial.

2. Actions shall be tried and heard either before a judge or judges, or before a judge sitting with assessors, or before a judge and jury, or before an official or special referee, with or without assessors.

This rule speaks of actions being tried and heard. The term trial alone is used throughout the following rules.

It may be convenient to show, briefly, the effect of the principal provisions of the Acts and Rules relating to the mode of trying questions with the light thrown upon them by decided cases.

The trial of an action may be:—

Before a judge or judges;

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Before a judge with assessors (see r. 28, *post*, p. 330, and note thereto);

Before a judge (*i.e.*, a single judge, unless a trial before several be specially ordered: r. 7, *post*, p. 321), with a jury;

Before an official referee (see rr. 30, *et seq.*, *post*, p. 332, and note thereto);

Before a special referee (see rr. 30, *et seq.*, *post*, p. 332, and note thereto);

Before an official or special referee with assessors (see rr. 28 and 30, *post*, pp. 330, 332, and note thereto).

The plaintiff may (except in interpleader) choose the mode of trial by giving notice of trial by one of the modes mentioned: Rule 3, *post*. But as to trial before a referee his power is subject to s. 57 of the Act of1873: see note to r. 30, *post*, p. 332. If the plaintiff fails to do so within six weeks after the close of the pleadings, the defendant may give notice of trial and choose the mode: Rule 4, *post*. The party to whom notice of trial by any mode, other than a jury, is given may, within four days, by notice, require that the issues of fact be tried by a jury: Rules 3 and 4, *post*.

The right thus given to either party to have issues of fact tried by a jury is an absolute right, subject only to the qualifications contained in r. 26, *post*, p. 329; *Sugg* v. *Silber*, 1 Q. B. D. 362. The last mentioned rule, however, enables a judge to order the trial without a jury of any question of issue arising in any cause or matter which might before the Act, without consent, have been tried without a jury. This rule applies in any case which before the Act would properly have been brought only in the Court of Chancery: see cases cited, *post*, p. 329.

So far as to the right of the parties to choose the mode of trial. But power in the matter is also given to the Court.

If neither party has required the issues of fact to be tried by a jury (but not otherwise, except in cases within rule 26: *Sugg* v. *Silber*, *ubi supra*), the judge may order the trial to be by any other mode than that of which notice has been given: Rule 5, *post*. A judge may order different questions of fact to be tried in different ways, and may direct the order in which, and the place at which, the several issues of fact shall be tried: Rule 6, *post*. A judge may order any question of law to be determined before the trial of questions of fact: O. XXXIV., r. 2, *ante*, p. 306.

A judge, either before or at the trial, may order an issue of fact to be tried by a jury: Rule 27, *post*. Subject to the rules, where a question of fact, or partly of law and partly of fact, is in issue, any party may by leave of a judge require the issue to be tried at the assizes, or the Middlesex or London sittings: s. 29 of the Act of 1873, *ante*, p. 38. The same thing may be done by consent, though no facts are in issue: *Ibid*. A judge may at any time order any question of fact, or of mixed law and fact, to be tried at the assizes, or at the sittings in London or Middlesex: Rule 29, *post*, p. 330. But the reason for such an order must appear: R. 29a, *post*, p. 331. If the action or any issues have to be tried by a jury, in whatever Division of the Court the cause be pending the trial must take place either at the assizes or at the London or Middlesex sittings held for such trials under s. 30 of the Act of 1873, *ante*, p. 39; and it goes into the general list for such sittings kept under r. 16, *post*, p. 324: *Warner* v. *Murdoch*, 4 Ch. D. 750, C. A.

A judge may at any stage of the action direct any necessary

inquiries or accounts to be made or taken, and that either in London or in a district registry: O. XXXIII., *ante*, p. 305; s. 66 of the Act of 1873. *ante*, p. 68. Order XXXVI. r. 2, 3.

A judge may, subject to the rules the effect of which has been briefly stated, refer any question for inquiry and report to an official or special referee. See s. 56 of the Act of 1873, *ante*, p. 63; and Rules 30, *et seq.*, *post*, p. 332, and notes thereto.

A judge may by consent, or where a prolonged investigation of documents or accounts or any scientific or local investigation is required may without consent, order any question of fact or any question of account to be tried before an official or special referee: s. 57 of the Act of 1873, *ante*, p. 63. See Rules 30, *et seq.*, *post*, p. 332, and notes.

See as to notice of trial, rr. 8 to 13, *post*, pp. 321, 323; as to entry for trial, rr. 10a, 14, 15, 17, 17a, *post*, pp. 322 to 325; and as to proceedings at trials, rr. 18 to 25, *post*, pp. 325 to 329.

The phraseology of the rule is incorrect in so far as it speaks of *actions* being tried by an official or special referee. He can only try the issues in an action. See *ante*, p. 64.

This rule does not apply to interpleader: *Hamlyn* v. *Batteley*, 6 Q. B. D. 63, C. A.

R. 3.

3. Subject to the provisions of the following Rules, the plaintiff may, with his reply, or at any time after the close of the pleadings, give notice of trial of the action, and thereby specify one of the modes mentioned in Rule 2; and the defendant may, upon giving notice within four days from the time of the service of the notice of trial, or within such extended time as a Court or a judge may allow, to the effect that he desires to have the issues of fact tried before a judge and jury, be entitled to have the same so tried.

Notice of trial by plaintiff. Choice of mode. Jury.

The following notice was issued in February, 1877, with reference to actions in the Chancery Division:—"Trials before a judge and jury in Chancery actions: Notice.—In actions assigned to the Chancery Division, when the plaintiff under O. XXXVI., r. 3, of the Rules of the Supreme Court, gives notice of trial before a judge and jury the action is to be entered for trial with the associates, instead of with the Chancery Registrar.

"Where after the plaintiff has given notice of trial in any other manner and has set down the action in the Chancery Division the defendant has, under the provisions of the same Rule, given notice that he desires to have the issues of fact tried before a judge and jury, the action will be marked in the cause book 'Jury trial at defendant's instance,' on the request of the solicitor for either party, and on the certificate of such solicitor that such notice has been duly given within the time, or extended time, referred to in Rule 3.

"Actions which have been so marked will be added by the associates to their list of actions for trial, upon the solicitor for either party bringing to them the certificate of the Chancery Registrar in the form given below, annexed to the statement of claim. Such actions will be placed in the list, in the order in which they are entered with the associates.

"[Reference to Record and Short Title.]

"I certify that this action was entered for trial in the cause book of the Chancery Division on the day of , and

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that it has been this day marked 'Jury trial at defendant's instance,' in accordance with a notice given by the defendant under Order XXXVI., rule 3, of the Rules of the Supreme Court. Dated the day of , 187 . A. B., for the Senior Registrar." (W. N. 1877, Pt. II., p. 162.)

The above rule, it will be observed, makes the plaintiff's right subject to the provisions of the following rules. See, as to this, note to the last rule, and rr. 4, 5, 6, 26, 27, 29, 30, *post*, pp. 321, 329 to 332.

A plaintiff, it has been held, is, under this rule, entitled to give notice of trial with his reply whether the pleadings are then closed or not: *Asquith* v. *Molineux*, 49 L. J. Q. B. 800; but he is not entitled to enter the case for trial until the pleadings are closed: *Metropolitan Inner Circle Railway* v. *Metropolitan Railway*, 5 Ex. D. 196. Rule 10a, *post*, creates a difficulty which does not seem to have been noticed. See also the Chancery Division Notice cited in note to O. XL., r. 1, *post*, p. 355.

As to trial before a referee, see note to r. 30, *post*, p. 332.

R. 4. Notice of trial by defendant. Choice of mode. Jury.

4. Subject to the provisions of the following Rules, if the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as a Court or judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, and thereby specify one of the modes mentioned in Rule 2; and in such case the plaintiff, on giving notice within the time fixed by Rule 3 that he desires to have the issues of fact tried before a Judge and Jury, [shall] be entitled to have the same so tried.

See notes to r. 2, *ante*, and the last rule. And as to trial before a referee, see note to r. 30, *post*, p. 332.

R. 4a. Order to dismiss for want of prosecution. (R. S. C., June, 1876, r. 13.)

4a. The defendant, instead of giving notice of trial, may apply to the Court or judge to dismiss the action for want of prosecution; and on the hearing of such application, the Court or a Judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the Court or judge may seem just.

This rule provides a mode of proceeding somewhat analogous to that under s. 101 of the C. L. P. Act, 1852; but the present procedure is much simplified: see *Litton* v. *Litton*, 3 Ch. D., 793, V.-C. H. The application should ordinarily be made by summons: *Freason* v. *Loe*, 26 W. R. 138, M. R. See *Evelyn* v. *Evelyn*, 13 Ch. D. 138.

As to the close of the pleadings when there are several defendants some of whom have had extension of time to plead, see *Ambroise* v. *Evelyn*, 11 Ch. D. 759.

As to vacating the registration of a *lis pendens*, where an action is dismissed under this rule, see *Pooley* v. *Bosanquet*, 7 Ch. D. 541.

R. 5. Order to change

5. In any case in which neither the plaintiff nor defendant has given notice under the preceding Rules that he

desires to have the issues of fact tried before a judge and jury, or in any case within the 57th section of the Act, if the plaintiff or defendant desires to have the action tried in any other mode than that specified in the notice of trial, he shall apply to the Court or a judge for an order to that effect, within four days from the time of the service of the notice of trial, or within such extended time as a Court or judge may allow.

Mode of trial.

An order cannot be made under this rule depriving either party of his right to try by a jury, although the case be such that a judge with assessors would be a better tribunal: *Sugg* v. *Silber*, 1 Q. B. D. 362.

See *Ward* v. *Pilley*, 5 Q. B. D. 427, at p. 430, C. A., as to cases within the 57th section of the Act of 1873; and also *Braggington* v. *Yates*, W. N. 1880, p. 150.

When the parties agree that the evidence shall be taken by affidavit, this amounts to an agreement that the action shall not be tried by a jury: *Brooke* v. *Wigg*, 8 Ch. D. 510, C. A.

R. 6.

6. Subject to the provisions of the preceding Rules, the Court or a Judge may, in any action at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the place or places for such trial or trials, and in all cases may order that one or more issues of fact be tried before any other or others.

Trial of different questions in different modes.

Place.

Order of trial.

As to ordering a question of law to be argued before trying the facts, see O. XXXIV., r. 2, *ante*, p. 306.

One issue of fact will only be ordered to be tried before the others in very exceptional cases: *Piercy* v. *Young*, 15 Ch. D. 475. See the principle explained by Jessel, M. R., *ibid.*, at p. 479; and for examples, see *Emma Silver Mining Co.* v. *Grant*, 11 Ch. D. 918, M. R.; *Tasmanian Main Line Co.* v. *Clark*, 27 W. R. 677, and *Thompson* v. *Woodfine*, 26 W. R. 678.

R. 7.

7. Every trial of any question or issue of fact by a jury shall be held before a single judge, unless such trial be specially ordered to be held before two or more judges.

Trial by jury.

Such trials must take place either at the London or Middlesex sittings held for jury trials under s. 30 of the Act of 1873, *ante*, p. 39, or at the assizes: *Warner* v. *Murdoch*, 4 Ch. D. 750, C. A.

Where there are distinct issues, involving separate causes of action, submitted to a jury, and they agree on some but cannot agree on the rest, the judge may take their findings on the issues as to which they are agreed and discharge them as to the rest, and enter judgment accordingly: *Marsh* v. *Isaacs*, 45 L. J. C. P. 505, C. A.

This rule seems to preserve trials at bar.

R. 8.

8. Notice of trial shall state whether it is for the trial of the action or of issues therein; and in actions in the Queen's Bench, Common Pleas, and Exchequer Divisions,

Form of notice of trial.

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the place and day for which it is [to be] entered for trial. It may be in the Form No. 14 in Appendix (B), with such variations as circumstances may require.

For such form, see post, p. 480, No. 14; and *Harris* v. *Gamble*, 7 Ch. D. 877.

The words in brackets were added to this rule by R. S. C., Dec. 1875, r. 12. The rule in its original form was inaccurate, because, by r. 10, *post*, notice of trial must precede entry.

R. 9. Length of notice of trial.

9. Ten days' notice of trial shall be given, unless the party to whom it is given has consented to take short notice of trial; and shall be sufficient in all cases, unless otherwise ordered by the Court or a Judge. Short notice of trial shall be four days' notice.

These are the periods formerly in use in the Common Law Courts: C. L. P. Act, 1852, s. 97; R. G., H. T. 1853, Rule 35.

R. 10. Notice to be before entry.

10. Notice of trial shall be given before entering the action for trial.

R. 10a. Expiry of notice. (R. S. C., Dec. 1875, r. 13.)

10a. Unless within six days after notice of trial is given the cause shall be entered for trial by one party or the other, the notice of trial shall be no longer in force. This Rule is not to apply in any case in which notice of trial has been already given or to trials not in London or Middlesex.

R. 11. Notice for London or Middlesex. Effect.

11. Notice of trial for London or Middlesex shall not be or operate as for any particular sittings; but shall be deemed to be for any day after the expiration of the notice on which the action may come on for trial in its order upon the list.

By the Act of 1873:—

Continuous sittings.

[s. 30. Subject to Rules of Court, sittings for the trial by jury of causes and questions or issues of fact shall be held in Middlesex and London, and such sittings shall, so far as is reasonably practicable, and subject to vacations, be held continuously throughout the year by as many judges as the business to be disposed of may render necessary. Any judge of the High Court of Justice sitting for the trial of causes and issues in Middlesex or London, at any place heretofore accustomed, or to be hereafter determined by Rules of Court, shall be deemed to constitute a Court of the said High Court of Justice.]

The periods of vacation are prescribed in O. LXI., *post*, p. 437. As to the lists for trial in London and Middlesex, see r. 16, *infra*.

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12. Notice of trial elsewhere than in London or Middlesex shall be deemed to be for the first day of the then next assizes at the place for which notice of trial is given.

As to the assizes, see s. 29 of the Act of 1873, *ante*, p. 38, and note thereto.

R. 12. Notice for the country. Effect.

13. No notice of trial shall be countermanded, except by consent, or by leave of the Court or a Judge, which leave may be given subject to such terms as to costs, or otherwise, as may be just.

R. 13. Countermand of notice.

In the Common Law Courts notice of trial might be countermanded by a four days' notice: C. L. P. Act, 1852, s. 98; R. G., H. T. 1853, Rule 34.

See, as to this and several other points in which the plaintiff's power of controlling the conduct of an action is curtailed, note to O. XXIII., r. 1, *ante*, p. 271.

R. 14. Entry by opposite party. London or Middlesex.

14. If the party giving notice of trial for London or Middlesex omits to enter the action for trial on the day or day after giving notice of trial, the party to whom notice has been given may, unless the notice has been countermanded under the last Rule, within four days enter the action for trial.

R. 15. *Entry in the country. By whom.*

15. *If notice of trial is given for elsewhere than in London or Middlesex, either party may enter the action for trial. If both parties enter the action for trial, it shall be tried in the order of the plaintiff's entry.*

R. 15a. Entry for trial in the country. (R. S. C., Dec., 1879, r. 4.)

15a. Order 39, Rule 15, is hereby repealed, and the following Rule substituted.

After notice of trial has been given of any action or issue to be tried elsewhere than in London or Middlesex, either party may at any time before the day next before the Commission day enter the action or issue for trial at the next assizes in the District Registry (if any) of the city or town where the trial is to be had, or with the Associate at the assize town as heretofore.

So long as there is no District Registry in the places enumerated in the first of the following columns, entries for trial may be made in the District Registries in the second of the following columns, *i. e.*, actions and issues for trial at—

Bodmin	may be entered in the District Registry at	Truro.
Carnarvon	,, ,,	Bangor.
Chelmsford	,, ,,	Colchester.
Lancaster	,, ,,	Preston.

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Lewes	may be entered in the District Registry at		Brighton.
Monmouth	„	„	Newport, Mon.
Stafford	„	„	Hanley.
Taunton or Wells	„	„	Bridgewater.
Warwick	„	„	Birmingham.
Winchester	„	„	Southampton.

The entry shall be made in a numbered list to be provided by the District Registrar in such vacant number as the party entering shall select, and the list shall be open for the inspection of all parties interested therein at all times during office hours. At the time of entry two copies of the pleadings shall be delivered as directed by Order XXXVI., Rule 17*a*, one of which shall be duly stamped with the amount of the fee payable on entry of the cause for trial.

When the trial of an action or issue which has been entered for trial has been postponed or withdrawn under Order XXIII., Rule 2, or settled, the party who made the entry shall immediately thereupon give notice thereof to the Registrar, and such entry shall be expunged from the list.

The Registrar shall close the list and transmit a corrected copy of the said list, together with the two copies of the pleadings, to the Associate at the assize town in such time that the same may be received at his office before the opening of the Commission.

Causes or issues entered for trial by the Associate shall be entered in such vacant numbers in the list so transmitted as the party entering may select. The list shall then be re-numbered consecutively, and shall be the cause list for the assizes.

If both parties enter the action or issue for trial, it shall be tried in the order of the Plaintiff's entry, and the Defendant's entry shall be vacated.

R. 16. Lists at London and Middlesex sittings.

16. The list or lists of actions for trial at the sittings in London and Middlesex respectively shall be prepared and the actions shall be allotted for trial without reference to the Division of the High Court to which such actions may be attached.

R. 17. Copies of pleadings.

17. *The party entering the action for trial shall deliver to the officer a copy of the whole of the pleadings in the action, for the use of the judge at the trial.* Such *copy* shall be in print, except as to such parts, if any, of the pleadings as are by these Rules permitted to be written,

This rule has been altered by R. S. C., Dec. 1875, r. 14, as follows:

17a. The first sentence of Order XXXVI., Rule 17, shall be altered as follows:—The party entering the action for trial shall deliver to the officer two copies of the whole of the pleadings in the action, one of which shall be for the use of the judge. In the second sentence the word "copies" shall be substituted for "copy." R. 17a. (R. S. C., Dec. 1875, r. 14.) Filing pleadings.

In May, 1877, the following notice was issued as to actions in the Chancery Division:—"No causes or actions will in future be entered for trial, unless two copies of the whole pleadings are, pursuant to rule 17 of O. XXXVI. of the Rules of Court, 1875, delivered to the officer at the same time." (W. N. 1877, Pt. II., p. 219.)

As to how far pleadings may be in writing, see O. XIX., r. 5, *ante*, p. 253; O. XXVII., r. 8, *ante*, p. 277.

18. If, when an action is called on for trial, the plaintiff appears, and the defendant does not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon him. R. 18. Non-appearance of defendant.

Formerly, in actions of ejectment, if the defendant did not appear at the trial the plaintiff has been entitled to a verdict without any proof: R. G., H. T. 1853, Rule 114.

In one case, Fry, J., laid down that the plaintiff must prove notice of trial: *Cockshott* v. *London General Cab Co.*, 26 W. R. 31; W. N. 1877, p. 214. This practice is new, and does not prevail in the other divisions. By r. 10, notice of trial must be given before the action is entered for trial. If it be thought necessary that the right to enter a cause for trial should be verified, it would seem in principle that the proper time to do so is the time of entry; not when the case is called on for trial. And it would be easy to make a rule that notice of trial should be proved in some way to the officer at the time of entry. In the Common Law Courts, in which undefended actions were familiar, and in the corresponding divisions in which they are familiar, it has never been found necessary to require a plaintiff to give any proof of notice of trial. The power of setting aside with costs a verdict or judgment improperly snatched has been found quite sufficient to prevent irregularity. If the new practice be generally adopted, the plaintiff in every case where there is the slightest chance of the defendant not appearing, must go to trial armed with an affidavit of notice of trial, on pain of an adjournment and having to bring up his witnesses a second time. In *Chorlton* v. *Dickie*, 13 Ch. D. 160, Fry, J., seemed inclined to disregard his former ruling.

19. If, when an action is called on for trial, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action, but if he has a counter- R. 19. Non-appearance of plaintiff.

Order XXXVI. rr. 19—21.

claim then he may prove such claim so far as the burden of proof lies upon him.

In *Cockle* v. *Joyce*, 7 Ch. D. 56, Fry, J., held that a defendant asking judgment under r. 19 must prove notice of trial. But it having been held by the Court of Appeal that where the respondent appears, and the appellant does not, the Court will not require proof of the notice of appeal, but the respondent may have the appeal dismissed with costs: *Ex parte Lowe*, 7 Ch. D. 160, C. A.; Fry, J., in *James* v. *Crow*, 7 Ch. D. 410, declined to follow his former decision.

Where notice of trial had been given by a sole plaintiff who subsequently filed a liquidation petition under which a trustee was appointed, and no one appeared at the trial for the plaintiff or his trustee, Fry, J., held that in the absence of the trustee, all he could do was to strike the case out of the list: *Eldridge* v. *Burgess*, 7 Ch, D. 410.

As to proceeding under this rule in the case of a test action, see *Robinson* v. *Chadwick*, 7 Ch. D. 878.

R. 20. Setting aside verdict or judgment by default.

20. Any verdict or judgment obtained where one party does not appear at the trial, may be set aside by the Court or a judge upon such terms as may seem fit, upon an application made within six days after the trial; such application may be made either at the assizes or in Middlesex.

For instances of the terms on which a verdict or judgment under this rule will be set aside, see *Wright* v. *Clifford*, 25 W. R. 369; *Michael* v. *Wilson*, *ibid*, 380; *King* v. *Sandeman*, 38 L. T. 461, C. A.; *Burgoine* v. *Taylor*, 9 Ch. D. 1, C. A.; see also O. XXIX., r. 14, *ante*, p. 286, which gives a general power to set aside any judgment by default.

R. 21. Adjournment of trial.

21. The judge may, if he think it expedient for the interests of justice, postpone or adjourn the trial for such time, and upon such terms, if any, as he shall think fit.

See *Lydall* v. *Martinson*, 5 Ch. D. 780, Fry, J., as to costs of adjournment; and *Steuart* v. *Gladstone*, 7 Ch. D. 394, as to grounds of postponing a trial.

R. 22. *Judgment.*

22. *Upon the trial of an action, the Judge may, at or after such trial, direct that judgment be entered for any or either party, as he is by law entitled to upon the findings, and either with or without leave to any party to move to set aside or vary the same, or to enter any other judgment, upon such terms, if any, as he shall think fit to impose; or he may direct judgment not to be entered then, and leave any party to move for judgment. No judgment shall be entered after a trial without the order of a Court or Judge.*

This rule was repealed by R. S. C., December, 1876, r. 3, and the following rule substituted:

22a. Order XXXVI., Rule 22, is hereby repealed, and instead thereof the following rule shall take effect :— Ord XXX r. 2

Upon the trial of an action the Judge may, at or after the trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration, or leave any party to move for judgment. No judgment shall be entered after a trial without the order of a Court or Judge.

Judgm Entry trial. Adjou ment f consid tion. Motior judgm

S. 22 of the Act of 1875 provides that nothing in the Act of 1873, or rules, "shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the judge to the jury before whom the same shall come for trial, with a proper and complete direction to the jury upon the law, and as to the evidence applicable to such issues: Provided also, that the said right may be enforced either by motion in the High Court of Justice or by motion in the Court of Appeal founded upon an exception entered upon or annexed to the record." (R. S. Dec. 1 r. 3.)

Formerly, in the Court of Chancery, the judge at the hearing had power to dispose both of questions of fact and of questions of law together. He could decide not only whether the plaintiff had proved the truth of the case, or the defendant the truth of the defence alleged by him, but also whether the claim or the defence was valid in law.

At Common Law it was otherwise. The judge at nisi prius was a commissioner to try the issues of fact joined between the parties as appearing upon the record, and to direct a verdict for plaintiff or defendant accordingly. He, of course, had power to decide questions of law arising incidentally in the course of the trial of the issues of fact, and in many other ways to deal with matters of law; but the broad question whether the plaintiff's claim, assuming his facts proved, is good in law, or whether the defendant's defence, if true in fact, is good in law, it was not within his province to determine. Those questions could be brought before the Court in banc by demurrer, or by motion for judgment non obstante veredicto, and sometimes in other ways; but not before the judge at the trial. This strict separation of issues of law from issues of fact was by no means always convenient. It is often, if not generally more convenient that the whole of the law of the case should be decided when the facts are ascertained. By s. 29 of the Act of 1873, *ante*, p. 38, every commissioner of assize, and by s. 30, *ante*, p. 39, a judge at the London or Middlesex sittings, constitute a Court of the High Court.

The original rule above set out left three courses open to the judge at the trial of an action :—(1.) To direct judgment to be entered for the party entitled to it, simply. (2.) To direct such judgment, subject to leave to move to set it aside. (3.) To direct that no judgment be then entered, and leave any party to move for judgment.

Under that rule, if the judge took either of the two latter courses, the motion following upon it was to be made to a Divisional Court. And s. 46 of the Act of 1873 gave the judge a general power to reserve any question for a Divisional Court, subject only to the qualification contained in s. 22 of the Act of 1875, *ante*, p. 113.

The Act of 1876 introduced a radical change. It enacts, s. 17, as a general rule, that proceedings in an action are to be taken

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before a single judge, and proceedings subsequent to trial before the judge who tries; leaving it to be settled by rules what matters might still be taken before Divisional Courts. The rules of December, 1876, were framed to give effect to this enactment. They contain an enumeration of the matters to be taken before Divisional Courts: O. LVIIa., *post*, p. 415; and motions for judgment are not among them. The above rule, one of those of the same group, accordingly prescribes the courses open to the judge at the trial of an action. He may order judgment to be entered. He may adjourn the matter for further argument; which must take place before himself. He may leave the matter at large for either party to move for judgment as they think fit; in which case, again, the application must be made to the judge himself. There is no longer any power to leave the decision of the case to a Divisional Court. And, except only where the case is tried by a jury and a new trial is desired, the tribunal to review the decision of a judge at a trial is the Court of Appeal, not a Divisional Court.

When judgment is ordered, where the registrar or other officer to enter judgment is not the officer at the trial the associate's certificate will, under Rule 24 of this Order, entitle the successful party to enter judgment accordingly. See O. XLI., *post*, p. 361. And execution may issue forthwith, unless execution is stayed: O. XLII., r. 15, *post*, p. 367. As to moving for a new trial by a party dissatisfied, see O. XXXIX., *post*, p. 349. And as to when a party may apply to the Court of Appeal to set aside such a judgment and enter another, see O. XL., r. 4a., *post*, p. 356.

This rule, it will be observed, applies only where the trial is of the action. A trial may still be ordered of specific issues only.

Where specific issues are submitted to a jury, and they agree in their findings on some of the issues, but cannot agree in the rest, the judge may take their findings on those as to which they are agreed and discharge them as to the rest: *Marsh* v. *Isaacs*, 45 L. J. C. P. 505, C. A.

Counsel's speeches.

In jury cases the number and order of counsel's speeches is still regulated by s. 18 of the C. L. P. Act, 1854. As to the Chancery Division see *Kino* v. *Rudkin*, 6 Ch. D. at p. 163; and *Metzler* v. *Wood*, 26 W. R. 125.

Hearing *in camerâ*.

Except in cases affecting lunatics and wards of court, or where the old ecclesiastical procedure continues, there is no power for a judge to hear a case in private. It must be tried in open court; *Nagle-Gillman* v. *Christopher*, 4 Ch. D. 173; and O. XXXVII., r. 1. As to official referees see O. XXXVI., r. 31.

R. 23.

Entry by associate.

23. Upon every trial at the assizes, or at the London and Middlesex sitting of the Queen's Bench, Common Pleas, or Exchequer Division, where the officer present at the trial is not the officer by whom judgments ought to be entered, the associate shall enter all such findings of fact as the judge may direct to be entered, and the directions, if any, of the judge as to judgment, and the certificates, if any, granted by the judge, in a book to be kept for the purpose.

As to certifying for a special jury, see 6 Geo. 4, c. 50, s. 34.

R. 24.

Certificate ... gment.

24. If the judge shall direct that any judgment be entered for any party absolutely, the certificate of the

associate to that effect shall be a sufficient authority to the proper officer to enter judgment accordingly. The certificate may be in the Form No. 15 in Appendix (B) hereto. Order XXXVI. rr. 24—26.

For such form, see *post*, p. 481, No. 15.

Formerly, when a cause was entered for trial, a copy of the record showing the issues to be tried, called the nisi prius record, was deposited with the officer. After the trial the nisi prius record was indorsed with the postea, showing the result of the trial, and delivered to the successful party as soon as he was entitled to sign judgment. The possession of the postea proved his right to judgment, and was the warrant to the proper officer to enter the judgment. There is now no nisi prius record, though under Rule 17 of this Order copies of the pleadings, one for the use of the judge, are to be deposited on entering the action for trial. The certificate provided by these rules takes the place of the postea. As to entry of judgment, see O. XLI., *post*, p. 361.

25. If the judge shall direct that any judgment be entered for any party subject to leave to move, judgment shall be entered accordingly upon the production of the associate's certificate. R. 25. Certificate subject to leave to move.

This rule would seem now to have no operation: see note to r. 22, *ante*, p. 327.

26. The Court or a judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Act could, without any consent of parties, be tried without a jury. R. 26. Order for trial without jury.

Under this rule, in any action which would formerly have been properly brought only in the Court of Chancery, and in which no party would have had an absolute right to a jury, it is now in the discretion of the Court to allow a trial by jury or not; and the Court of Appeal, as a rule, will not interfere with the discretion of the Court below: *Swindell* v. *Birmingham Syndicate*, 3 Ch. D. 127, C. A.; *Ruston* v. *Tobin*, 10 Ch. D. 558, C. A.: *Re Martin*, 30 W. R. 527, C. A.; see also *Clark* v. *Cookson*, 2 Ch. D. 746, V.-C. H.; *West* v. *White*, 4 Ch. D. 631, V.-C. B.; *Bordier* v. *Burrell*, *ibid.*, 512, M. R.; *Sykes* v. *Firth*, 46 L. J. Ch. 627, V.-C. M.; *Garling* v. *Royds*, 25 W. R. 123, V.-C. H. As to the principle on which this discretion should be exercised, see per Jessel, M. R., in *Bordier* v. *Burrell*, and *Re Martin*, *ubi supra*; *Clements* v. *Norris*, 6 Ch. D. 129, V.-C. H.; *Powell* v. *Williams*, 12 Ch. D. 234, Fry, J. Where there are several defendants, one alone cannot insist on a jury trial if the others do not also desire it, but this does not interfere with the discretion given by r. 27: *Mirehouse* v. *Barnett*, 47 L. J. Ch. 689; *Back* v. *Hay*, 5 Ch. D. 235. In the following case applications for a jury have been refused, namely; in an action to restrain a nuisance when the parties had agreed that the evidence should be taken by affidavit: *Brook* v. *Wigg*, 8 Ch. D. 510, C. A.: see too *Dent* v. *Sovereign Life Ass. Co.*, 27 W. R. 379; in an action to restrain the use of a trade

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name for a machine and for the infringement of a trade mark: *Singer Manufacturing Co.* v. *Loog*, 11 Ch. D. 656; see too *Spratt's Patent* v. *Ward & Co.*, 11 Ch. D. 240; in an action to set aside an agreement which the plaintiff had been induced to enter into by the fraudulent representatons of the defendant: *Ruston* v. *Tobin*, 10 Ch. D. 558, C. A.: see too *Back* v. *Hay*, 5 Ch. D. 235; in an action to enforce specific performance of a contract: *Pilley* v. *Baylis*, 5 Ch. D. 241; *Usil* v. *Whelpton*, 45 L. T. 39; in an action involving title to land and a right of way where the evidence consisted chiefly of conveyances, photographs, and plans: *Wedderburne* v. *Pickering*, 13 Ch. D. 769; and in an action to restrain the publication of a trade libel: *Thomas* v. *Williams*, 14 Ch. D. 864.

See note to Rule 2, *ante*, p. 317.

R. 27. Order for trial by jury.

27. The Court or a judge may, if it shall appear either before or at the trial that any issue of fact can be more conveniently tried before a jury, direct that such issue shall be tried by a judge with a jury.

See note to Rule 2, *ante*, p. 317, and to the last rule, and for instances where the rule has been applied, see *West* v. *White*, 4 Ch. D. 631; *Clements* v. *Norris*, 6 Ch. D. 129; *Powell* v. *Williams*, 12 Ch. D. 234; *Jenkins* v. *Morris*, 14 Ch. D. 674.

R. 28. Trial with assessors.

28. Trials with assessors shall take place in such manner and upon such terms as the Court or a judge shall direct.

By the Act of 1873:—

[S. 56. The High Court or the Court of Appeal may also, in any such cause or matter as aforesaid in which it may think it expedient so to do, call in the aid of one or more assessors specially qualified, and try and hear such cause or matter wholly or partially with the assistance of such assessors. The remuneration, if any, to be paid to such . . . . assessors shall be determined by the Court.]

This section does not take away the right of a party to have issues of fact tried by a jury: *Sugg* v. *Silber*, 1 Q. B. D. 362.
See Rule 2, *ante*, p. 317, and note thereto.

R. 29. Order for trial on circuit or London or Middlesex sitting.

29. In any cause the Court or a judge of the Division to which the cause is assigned may, at any time or from time to time, order the trial and determination of any question or issue of fact, or partly of fact and partly of law, by any commissioner or commissioners appointed in pursuance of the 29th section of the said Act, or at the sittings to be held in Middlesex or London, and such

question or issue shall be tried and determined accordingly.

See s. 29 of the Act of 1873, *ante*, p. 38 ; and note to Rule 2, *ante*, p. 317.

R. 29a. Order in Chancery Division. (R. S. C., Dec. 1876, r. 4.)

29a. Where in any action in the Chancery Division the action or any question at issue in the action is ordered to be tried before any commissioner or commissioners of assize, or at the London or Middlesex sittings of any Division other than the Chancery Division, the order directing such trial shall state on its face the reason for which it is expedient that the action, question, or issue should be so tried and should not be tried in the Chancery Division.

This last rule only applies where a special order is made by a judge of the Chancery division under the preceding rule. It does not interfere with the right of suitors in the Chancery Division, as well as in other Divisions, to lay their place of trial on circuit, or to try their issues of fact by jury at the London or Middlesex sittings: *Warner* v. *Murdoch*, 4 Ch. D. 750, C. A.; *Hunt* v. *City of London Real Property Co.*, 3 Q. B. D. 19, C. A. As to what are sufficient grounds for an order within the meaning of this rule, and as to the form of the order, see *Wood* v. *Hamblet*, 6 Ch. D. 113, M. R. An order under this rule will not be made if the effect would be to delay the trial unfairly: *Lloyd* v. *Jones*, 7 Ch. D. 390, Fry, J.

R. 29aa. Rotation among official referees. (R. S. C., June, 1876, r. 14.)

29aa. The business to be referred to the Official Referees appointed under the Supreme Court of Judicature Act, 1873, shall be distributed among such official referees in rotation by the clerks to the Registrars of the Supreme Court, Chancery Division, in like manner in all respects as the business referred to conveyancing counsel appointed under the Act of the 15th and 16th Vict., cap. 80, section 41, is directed to be distributed by the second of the Consolidated General Orders of the Court of Chancery.

For the order here referred to see Morgan's Acts and Orders, p. 383, ed. 4.

R. 29b. Indorsement of order with name of referee. (R. S. C., June, 1876 r. 15.)

29b. When an order shall have been made referring any business to the official referee in rotation, such order, or a duplicate of it, shall be produced to the Registrar's clerk, whose duty it is to make such distribution as aforesaid; and such clerk shall (except in the case provided for by Rule 29c of this order) endorse thereon a note specifying the name of the official referee in rotation to whom such business is to be referred; and the order so

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indorsed shall be a sufficient authority for the official referee to proceed with the business so referred.

R. 29c. Order to refer to particular official referee. (R. S. C., June, 1876, r. 16).

29c. The two last preceding Rules of this Order are not to interfere with the power of the Court, or of the judge at chambers, to direct or transfer a reference to any one in particular of the said official referees, where it appears to the Court or the judge to be expedient; but every such reference or transfer shall be recorded in the manner mentioned in Rule 2 of the second of the said Consolidated General Orders, and a note to that effect be indorsed on the order of reference or transfer; and in case any such reference or transfer shall have been or shall be made to any one in particular of the said referees, then the clerk in making the distribution of the business according to such rotation as aforesaid shall have regard to any such reference or transfer.

R. 30. Trial before referee. Place.

30. Where any cause or matter, or any question in any cause or matter, is referred to a referee, he may, subject to the order of the Court or a judge, hold the trial at or adjourn it to any place which he may deem most convenient, and have any inspection or view, either by himself or with his assessors (if any), which he may deem expedient for the better disposal of the controversy before him. He shall, unless otherwise directed by the Court or a judge, proceed with the trial de die in diem, in a similar manner as in actions tried by a jury.

View.

Sitting de die in diem.

The provision as to sitting de die in diem is directory: *Robinson* v. *Robinson*, 35 L. T. 337.

By the Act of 1873:—

Reference for inquiry and report.

[S. 56. Subject to any Rules of Court and to such right as may now exist to have particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice or before the Court of Appeal, may be referred by the Court or by any Divisional Court or judge before whom such cause or matter may be pending, for inquiry and report to any official or special referee, and the report of any such referee may be adopted wholly or partially by the Court, and may (if so adopted) be enforced as a judgment by the Court. The remuneration (if any) to be paid to such special referees . . . . shall be determined by the Court.]

Reference of accounts or issues for trial.

[S. 57. In any cause or matter (other than a criminal proceeding by the Crown) before the said High Court

in which all parties interested who are under no disability consent thereto, and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the Court or a judge, conveniently be made before a jury, or conducted by the Court through its other ordinary officers, the Court or a judge may at any time, on such terms as may be thought proper, order any question or issue of fact or any question of account arising therein to be tried either before an official referee, to be appointed as hereinafter provided, or before a special referee to be agreed on between the parties; and any such special referee so agreed on shall have the same powers and duties and proceed in the same manner as an official referee. All such trials before referees shall be conducted in such manner as may be prescribed by Rules of Court, and subject thereto in such manner as the Court or judge ordering the same shall direct.] Order XXXVI. r. 30.

See note to s. 57, *ante*, p. 64. The power to refer questions of account under this section are co-extensive with the powers given by s. 3 of the C. L. P. Act, 1854; and when the Court can compulsorily refer questions of account it may also refer all the other issues of fact in the action: *Ward* v. *Pilley*, 5 Q. B. D. 427, C. A.

[S. 58. In all cases of any reference to or trial by referees under this Act the referees shall be deemed to be officers of the Court, and shall have such authority for the purpose of such reference or trial as shall be prescribed by Rules of Court or (subject to such Rules) by the Court or judge ordering such reference or trial; and the report of any referee upon any question of fact on any such trial shall (unless set aside by the Court) be equivalent to the verdict of a jury.] Powers of referees.

[S. 59. With respect to all such proceedings before referees and their reports, the Court or such judge as aforesaid shall have, in addition to any other powers, the same or the like powers as are given to any Court whose jurisdiction is hereby transferred to the said High Court with respect to references to arbitration and proceedings before arbitrators and their awards respectively, by the Common Law Procedure Act, 1854.] Control of court.

The provisions of the C. L. P. Act, 1854, with respect to arbitrations are contained in ss. 3 to 17. They are as follows:—

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Questions of account.

s. 3. "If it be made appear, at any time after the issuing of the writ, to the satisfaction of the Court or a judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account, which cannot conveniently be tried in the ordinary way, it shall be lawful for such Court or judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the Court, or in country causes to the judge of any County Court, upon such terms as to costs and otherwise as such Court or judge shall think reasonable; and the decision or order of such Court or judge or the award or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matter referred."

This is repealed as to County Court Judges by 21 & 22 Vict. c. 74, s. 5. As to the classes of cases to which the section applies, see note on the section in Day's C. L. P. Acts, p. 264, ed. 4; and *Ward* v. *Pilley*, 5 Q. P. D. 427, C. A.; where *Clow* v. *Harper*, 3 Ex. D. 198, C. A., was not referred to.

Special case or issue.

s. 4. "If it shall appear to the Court or a judge that the allowance or disallowance of any particular item or items in such account depends upon a question of law fit to be decided by the Court, or upon a question of fact fit to be decided by a jury, or by a judge upon the consent of both parties as hereinbefore provided, it shall be lawful for such Court or judge to direct a case to be stated, or an issue or issues to be tried; and the decision of the Court upon such case, and the finding of the jury or judge upon such issue or issues shall be taken and acted upon by the arbitrator as conclusive."

Arbitrator may state case.

s. 5. "It shall be lawful for the arbitrator upon any compulsory reference under this Act, or upon any reference by consent of parties where the submission is or may be made a rule or order of any of the Superior Courts of Law or Equity at Westminster, if he shall think fit, and if it is not provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the Court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the Court."

See Rule 34, *post*, p. 341. Error did not lie from the decision of the Court upon a case so stated. But see now s. 19 of the Act of 1873, *ante*, p. 13; and *Jones* v. *Victoria Graving Dock Co.*, 2 Q. B. D. 314; *Mirabita* v. *Imperial Ottoman Bank*, 22 Sol. Journal, 237, C. A.

This section applies to arbitrations under the Lands Clauses Act, 1845: *Rhodes* v. *Airedale Commissioners*, 1 C. P. D. 380, C. A.; see too *Warburton* v. *Haslingdean Local Board*, 48 L. J., C. P. 451.

Reference at trial.

s. 6. "If upon the trial of any issue of fact by a judge under this Act it shall appear to the judge that the questions arising thereon involve matter of account which cannot conveniently be tried before him, it shall be lawful for him,

at his discretion, to order that such matter of account be referred to an arbitrator appointed by the parties, or to an officer of the Court, or, in country causes, to a judge of any County Court, upon such terms as to costs and otherwise as such judge shall think reasonable; and the award or certificate of such referee shall have the same effect as hereinbefore provided as to the award or certificate of a referee before trial; and it shall be competent for the judge to proceed to try and dispose of any other matters in question not referred in like manner as if no reference had been made." Order XXXVI. r. 30.

This section is repealed as to County Court judges by 21 & 22 Vict. c. 74, s. 5. See also the larger provision of ss. 56 and 57 of the Act of 1873, set out above.

s. 7. "The proceedings upon any such arbitration as aforesaid shall, except otherwise directed hereby or by the submission or document authorising the reference, be conducted in like manner, and subject to the same rules and enactments, as to the power of the arbitrator and of the Court, the attendance of witnesses, the production of documents, enforcing or setting aside the award, and otherwise, as upon a reference made by consent under a rule of Court or judge's order." Proceedings on reference.

This section and the next are coextensive with s. 5, and their provisions apply to references by consent: *Re Morris*, 6 E. & B. 383. As to the attendance of witnesses and the production of documents before an arbitrator, see 3 & 4 Will. 4, c. 42, s. 40; and App., Form H., No. 22, *post*, p. 585.

s. 8. "In any case where reference shall be made to arbitration as aforesaid, the Court or a judge shall have power at any time, and from time to time, to remit the matters referred, or any or either of them, to the reconsideration and redetermination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said Court or judge may seem proper." Power to remit to arbitrator.

s 9. "All applications to set aside any award made on a compulsory reference under this Act shall and may be made within the first seven days of the term next following the publication of the award to the parties, whether made in vacation or term; and if no such application is made, or if no rule is granted thereon, or if any rule granted thereon is afterwards discharged, such award shall be final between the parties." Setting aside award.

See *Mercier* v. *Pepperell*, 19 Ch. D. 58, as to notice of motion.

s. 10. "Any award made on a compulsory reference under this Act may, by authority of a judge, on such terms as to him may seem reasonable, be enforced at any time after seven days from the time of publication, notwithstanding that the time for moving to set it aside has not elapsed." Enforcement.

s. 11. "Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences be- Submission and power to stay.

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tween them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the Court in which action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such Court or judge may seem fit; provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require."

See *Piercy* v. *Young*, 14 Ch. D. 200, C. A., as to revocation of a submission; and *Randall* v. *Thompson*, 1 Q. B. D. 748, C. A., as to stay of proceedings. An agreement to refer disputes to a foreign tribunal is within this section: *Law* v. *Garrett*, 8 Ch. D. 26.

Single arbitrator.

s. 12. "If in any case of arbitration the document authorizing the reference provide that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator; or if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the terms of such document do not show that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one; or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator; or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and the terms of the document authorizing the reference do not show that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one; then in every such instance any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if within seven clear days after such notice shall have been served, no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any judge of any of the Superior Courts of Law or Equity at Westminster, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator as the case may be, and such arbitrator, umpire, and third arbitrator respectively shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties."

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s. 13. "When the reference is or is intended to be to two arbitrators, one appointed by each party, it shall be lawful for either party, in the case of the death, refusal to act, or incapacity of any arbitrator appointed by him, to substitute a new arbitrator, unless the document authorizing the reference show that it was intended that the vacancy should not be supplied; and if on such a reference one party fail to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party shall have appointed an arbitrator, and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference, and an award made by him shall be binding on both parties as if the appointment had been by consent; provided, however, that the Court or a judge may revoke such appointment on such terms as shall seem just." Two arbitrators, failure of one.

s. 14. "When the reference is to two arbitrators, and the terms of the document authorising it do not show that it was intended that there should not be an umpire, or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award, unless they be called upon by notice as aforesaid to make the appointment sooner." Umpire.

s. 15. "The arbitrator acting under any such document or compulsory order of reference as aforesaid, or under any order referring the award back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed, and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party, but the parties may, by consent in writing enlarge the term for making the award; and it shall be lawful for the Superior Court of which such submission, document, or order is or may be made a rule or order, or for any judge thereof, for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the award; and if no period be stated for the enlargement in such consent or order for enlargement, it shall be deemed to be an enlargement for one month; and in any case where an umpire shall have been appointed, it shall be lawful for him to enter on the reference in lieu of the arbitrators, if the latter shall have allowed their time or their extended time to expire without making an award, or shall have delivered to any party or to the umpire a notice in writing stating that they cannot agree." Time for making award.

s. 16. "When any award made on any such submission, document or order of reference as aforesaid, directs that possession of any lands or tenements, capable of being the subject of an action of ejectment shall be delivered to any party, either forthwith or at any future time, or that any such party is entitled to the possession of any such lands or tenements, it shall be lawful for the Court of which the docu- Award for land.

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ment authorizing the reference is or is made a rule or order to order any party to the reference who shall be in possession of any such lands or tenements, or any person in possession of the same claiming under or put in possession by him since the making of the document authorizing the reference, to deliver possession of the same to the party entitled thereto, pursuant to the award, and such rule or order to deliver possession shall have the effect of a judgment in ejectment against every such party or person named in it, and execution may issue, and possession shall be delivered by the sheriff as on a judgment in ejectment.

Making agreement or submission a rule of court.

s. 17. "Every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the Superior Courts of Law or Equity at Westminster, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of court; and if in any such agreement or submission it is provided that the same shall or may be made a rule of one in particular of such Superior Courts, it may be made a rule of that Court only; and if when there is no such provision a case be stated in the award, for the opinion of one of the Superior Courts, and such Court be specified in the award, and the document authorizing the reference have not, before the publication of the award to the parties been made a rule of court, such document may be made a rule only of the Court specified in the award; and when in any case the document authorizing the reference is or has been made a rule or order of any one of such Superior Courts, no other of such Courts shall have any jurisdiction to entertain any motion respecting the arbitration or award."

The proper course now, it seems, is to make the submission and not the award a rule of court: *Jones* v. *Jones*, 14 Ch. D. 593, C. A. This may be done by an *ex parte* application at chambers: *Re Davey*, 49 L. J. Ch. 568, C. A. As to enforcing the award in a reference by consent, see *Jones* v. *Wedgwood*, 19 Ch. D. 56, Chitty, J.

Revocation.

A submission which can merely be made a rule of court under section 17 is not thereby rendered irrevocable under 3 & 4, Will. 4, c. 42, s. 29: that section applying only to a submission by rule of court in an action, or a submission containing an agreement that it may be made a rule of court: *Mills* v. *Bayley*, 2 H. & C. 36: *Thomson* v. *Anderson*, L. R. 9 Eq., 523, V.-C. M.; *Re Rowe and Meier*, L. R. 6 C. P. 212. *Randall* v. *Thompson*, 1 Q. B. D. 748, C. A. A general agreement to refer future differences as opposed to a submission of an existing dispute to a particular arbitrator cannot, it seems, be revoked by one party alone: *Piercy* v. *Young*, 14 Ch. D. 200, C. A.

For a form of reference by consent in an action, see App. H., No. 22, *post*, p. 585.

Practice.

The practice of arbitration has long been in use; being governed by the statute just set out, as well as others. An arbitrator has always been, and still is, a person to whose absolute decision a matter is referred; and his judgment is final, and without appeal, either upon grounds of fact or of law. The Judicature Acts and Rules have made no change in the law of arbitration upon this

point: *Cruikshank* v. *Floating Baths Co.*, 1 C. P. D. 260; *Lloyd* v. *Lewis*, 2 Ex. D. 7.

The Court has power by injunction to restrain an unfit or incompetent person from acting as arbitrator: *Beddow* v. *Beddow*, 9 Ch. D. 89, M. R.

Three kinds of references to arbitration are in habitual use (besides those under the Lands Clauses Acts, and other Acts of the same class):—

First.—References to arbitration, by consent, of controversies as to which no action or suit is pending, but in which, if the conditions of the Acts be complied with, the submission may be made a rule of court, and the award may be enforced under 9 & 10 Will. 3, c. 15, and sec. 17 of the C. L. P. Act, 1854, *supra*.

Secondly.—References of actions by consent of the parties.

Such references have usually taken one or another of three forms: The submission has been of the action simply; or of the action and all matters in difference, so as to refer all controversies though not included in the action; or of the action and all matters in difference, with power to say what shall be done, so as to enable the arbitrator not only to determine rights or award damages, as the case may be, but to direct the doing of such acts as may be desirable. As to the time for moving to set aside an award, see *ante*, p. 37.

Thirdly.—Compulsory references to the Masters in cases in which the matter in dispute consists wholly or in part of matters of mere account, under ss. 3 to 10 of the C. L. P. Act, 1854, *supra*.

There is nothing in the Judicature Acts or Rules to take away the power of compulsory reference to a Master under the last-mentioned sections; and the decision of the Master under such a reference is still final: *Cruikshank* v. *Floating Baths Co.*, 1 C. P. D. 260, and see Form H. No. 33, *post*, p. 592.

Referees and their powers.

The Act of 1873, s. 56, *ante*, p. 63, introduces a new kind of reference—new at least in most Divisions of the Court—under which the referee is not to decide but to report; as matters referred to chambers by the Court of Chancery are reported upon. If a question be referred for inquiry and report under this section it is expressly provided that the Court may or may not adopt the report of the referee: see *Mayor of Birmingham* v. *Allen*, W. N. 1877. p. 190, M. R.; *Mellin* v. *Monico*; *Pontifex* v. *Severn*; *Longman* v. *East*, 3 C. P. D. 142. C. A.

Sec. 57 of the Act of 1873, *ante*, p. 63, again provides for yet another kind of reference. Under it. the referee is not, as under the previous section, merely to report facts, so as to enable the Court to determine the issues; he is to try the issues referred to him. The section authorizes a reference, *without consent*, of question or issues where the matter involves any prolonged examination of documents or accounts, or any scientific, or local investigation, which cannot conveniently be made before a jury or conducted by the Court through its other ordinary officers. It authorises a reference, *with consent*, of any question or issue of fact, or any question of account. Where the Court can compulsorily refer a question of account in an action it may at the same time refer all the other issues in the action: *Ward* v. *Pilley*, 5 Q. B. D. 427, C A., but see *Clow* v. *Harper*, 3 Ex. D. 198, C. A. There is no

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power under this section, even with consent, to refer *the action*, nor anything except the questions or issues of fact arising in it, or some of them: *Mellin* v. *Monico*, 3 C. P. D. 142. C. A.

Under neither kind of reference has the referee any power to direct judgment to be entered; that is for the court: *Ibid.*

The report on a reference under s. 56 is, by the terms of that section, subject to review. The finding of a referee, on a reference under s. 57. is, by s. 58, *ante*, p. 64, equivalent to the verdict of a jury, and may be reviewed and set aside as a verdict may: *Ibid.*

Notwithstanding the wide language of some of the Rules of Court (see rr. 2, 3, 4, 5, of this Order; and O. XL. rr. 2 and 3, *post*, p. 355) it is now decided, that the rules are not to be construed as giving any power of sending matters to a referee, either compulsorily or by consent, beyond that conferred by sections 56 and 57 just considered: *Ibid.*

If a referee states a case or finds the facts specially, the Court may require his reasons and explanations, and if necessary send the matter back to him or another referee: r. 34, *post*.

The trial of an action by a referee is to be conducted in the same manner as before a judge, and he is to have the same authority as a judge: rr. 31 and 32, *infra*.

It has been held that an application to review the finding of a referee under the Judicature Acts must be supported by evidence, on affidavit or otherwise, of the proceedings before him. Counsel who appeared before him cannot move on his own statement: *Stubbs* v. *Boyle*, 2 Q. B. D. 124. As to time for moving, see *Sullivan* v. *Rivington*, 28 W. R. 372; as to notice of motion, see *Graves* v. *Taylor*, 27 W. R. 412; and *Burrard* v. *Callisher*, 19 Ch. D. 644.

The provision in r. 30, *supra*, directing a referee to sit de die in diem is directory only; non-compliance with it is not a ground for setting aside his finding: *Robinson* v. *Robinson*, 35 L. T. 337, C. P. D.

As to fees upon proceedings before official referees, see Order of 24th April, 1877, *post*, p. 669.

R. 31. Evidence before referee. Witness. Procedure.

31. Subject to any order to be made by the Court or judge ordering the same, evidence shall be taken at any trial before a referee, and the attendance of witnesses may be enforced by subpœna, and every such trial shall be conducted in the same manner, as nearly as circumstances will admit, as trials before a judge of the High Court, but not so as to make the tribunal of the referee a public Court of Justice.

To compel the attendance of a witness before an arbitrator it has hitherto been necessary to obtain a judge's order under 3 & 4 Will. 4, c. 42, s. 4. See O. XXXVII., r. 1, *post*, p. 340, as to evidence.

R. 32. Authority of referee.

32. Subject to any such order as last aforesaid, the referee shall have the same authority in the conduct of any reference or trial as a judge of the High Court when presiding at any trial before him.

This rule does not give him authority to enter judgment: *Mellin* v. *Monico*, 3 C. P. D. 142. C. A.; or to order the production of documents: *Daurillier* v. *Myers*, 17 Ch. D. 346. M. R. For

the purpose of obtaining production application should be made at judge's Chambers: *Ibid.*

33. Nothing in these Rules contained shall authorise any referee to commit any person to prison or to enforce any order by attachment or otherwise. R. 33. No power in referee to commit.

34. *The referee may, before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the decision of the Court, or state any facts specially, with power to the Court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the Court may direct; and the Court shall have power to require any explanation or reasons from the referee, and to remit the cause or matter, or any part thereof, for re-trial or further consideration to the same or any other referee.* R. 34. *Report of referee. Case.*

Rule 34 is hereby annulled, and the following shall stand in lieu thereof:— R. 34. (R. S. C., March, 1879 r. 5.)

The referee may, before the conclusion of any trial before him or by his report under the reference made to him, submit any question arising therein for the decision of the Court, or state any facts specially, with power to the Court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the Court may direct; and the Court shall have power to require any explanation or reasons from the referee, and to remit the cause or matter, or any part thereof, for re-trial or further consideration to the same or any other referee; or the Court may decide the question referred to any referee on the evidence taken before him, either with or without additional evidence as the Court may direct. Report of referee. Powers of court.

The powers given by this rule are analogous to, but more extensive than those conferred by s. 5 of the C. L. P. Act, 1854, *ante*, p. 334. That section simply enabled an arbitrator to state his award as to the whole or any part thereof in the form of a special case for the opinion of the Court. And the Court could only deal with the case as stated. Under this rule the Court may require of the referee explanations or reasons, or send the matter back for re-trial or reconsideration, and to another referee if it thinks fit. The Court, too, may enter the order of the Court as it thinks fit.

See also s. 58 of the Judicature Act. 1873, *ante*, p. 64. and note to Rule 30, *ante*, p. 338, as to the control of the Court over referees.

Under the original rule the Court had no power to vary the report of the referee. It could only remit the matter to him: *Dunkirk Colliery Co.* v. *Lever*, 9 Ch. D. 20, C. A. The last clause of the new rules supplies this omission. As to applications to vary a referee's report. see *Re Brook*, 45 L. T. 172.

Order XXXVII.

ORDER XXXVII.

EVIDENCE GENERALLY.

R. 1. Mode of giving evidence at trial.

1. In the absence of any agreement between the parties, and subject to these Rules, the witnesses at the trial of any action or at any assessment of damages, shall be examined vivâ voce and in open court, but the Court or a judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or judge may think reasonable, or that any witness whose attendance in Court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner; provided that where it appears to the Court or judge that the other party bonâ fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

Cross-examination.

By the Act of 1875, in substitution for s. 72 of the Act of 1873:—

[S. 20. Nothing in this Act or in the first schedule hereto, or in any Rules of Court to be made under this Act, save as far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read, shall affect the mode of giving evidence by the oral examination of witnesses in trials by jury, or the rules of evidence, or the law relating to jurymen on juries.]

As to taking evidence by affidavit by consent, see the next Order.

As to depositions, see Rule 4 of this Order, and notes thereto.

In *Pattison* v. *Wooler*, 1 Ch. D. 464, Bacon, V.-C., ordered a party who unreasonably refused to admit evidence by affidavit to pay the costs. The agreement to try on affidavit must be a formal consent in writing: *New Westminster Brewery Co.* v. *Hannah*, 1 Ch. D. 278, V.-C. H. The fact that an affidavit has been used on motion, or other interlocutory application, gives no right to read it at the trial: *Perkins* v. *Slater*, 1 Ch. D. 83, V.-C. H.; *Blackburn Union* v. *Brooks*, 7 Ch. D. 68, Fry, J. Proof of a will in solemn form by affidavit was refused, though the property was very small, and none of the parties cited had appeared: *Cook* v. *Tomlinson*, 24 W. R. 851, P. D. See also *Brown* v. *White*, 24 W. R. 456, M. R.; *Re Woolley's Trusts*, *Ibid.*, 783, V.-C. H. In

Attorney-General v. *Metropolitan Railway Co.*, 5 Ex. D. 218, C. A., the Court declined to allow an information against the company to recover passenger duty to be tried on affidavit.

As to affidavits in Admiralty actions, see *The Sfactoria*, 2 P. D. 3.

Fresh evidence may properly be admitted at any stage of an action, when a party has been taken by surprise: *Bigsby* v. *Dickenson*, 4 Ch. D. 24, C. A. As to fresh evidence before the Court of Appeal, see O. LVIII., r. 5, and note thereto, *post*, p. 421.

The rule is that witnesses are to be examined viva voce and in open court: *Warner* v. *Moses*, 16 Ch. D. at p. 101. For the exceptions, see O. XXXVI., r. 31, Rule 4 of this order, and the special proceedings referred to in *Nagle-Gillman* v. *Christopher*, 4 Ch. D. 173, M. R., at p. 175.

R. 2. Evidence on motion, petition or summons.

2. Upon any motion, petition, or summons evidence may be given by affidavit; but the Court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.

Cross-examination in the case provided for by this rule was formerly in Chancery before an examiner, under 15 & 16 Vict. c. 86, s. 40. See Morgan's Acts and Orders, p. 193, ed. 4.

As to evidence by affidavit on a motion for judgment under O. XL., see *Ellis* v. *Robins*, 50 L. J. Ch. 512, V.-C. H., *sed qu.?*.

R. 3. Affidavit, how framed.

3. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same.

See *Gilbert* v. *Endean*, 9 Ch. D. at pp. 266, 267, C. A., as to what constitutes an interlocutory motion for the purpose of rendering admissible affidavits as to information or belief.

The power given by the last clause of this rule, may, in the absence of any special order of the Court or judge, be exercised by the taxing officer: R. S. C. (Costs), r. 18, *post*, p. 466.

R. 3a. Form of affidavits. (R. S. C., April, 1880, r. 12.)

3a. Every affidavit shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. Every affidavit shall be written or printed bookwise. No costs shall be allowed for any affidavit or part of an affidavit substantially departing from this rule.

R. 3b. Description and address of deponent to be stated. (R. S. C., April, 1880, r. 13.)

3b. Every affidavit shall state the description and true place of abode of the deponent.

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R. 3c. Affidavits made by two or more deponents. (R. S. C., April, 1880, r. 14.)

3c. In every affidavit made by two or more deponents the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents.

R. 3d. Affidavit to be filed. (R. S. C., April, 1880, r. 15.)

3d. Every affidavit shall be filed in the Central Office. There shall be appended to every affidavit a note showing on whose behalf it is filed.

By rule 3 of R. S. C., May 1880, so much of this rule as requires affidavits to be filed in the Central Office shall not apply to affidavits required to be filed in a District Registry. See *ante*, O. XXXV., r. 16, p. 316.

R. 3e. Alterations in affidavits. (R. S. C., April, 1880, r. 16.)

3e. No affidavit having in the jurat or body thereof any interlineations, alteration, or erasure shall without leave of the Court or a judge be read or made use of in any matter depending in Court unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, or, if taken at the Central Office, either by his initials or by the stamp of that office, nor in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialled in the margin of the affidavit by the officer taking it.

R. 3f. Affidavits by illiterate persons. (R. S. C., April, 1880, r. 17.)

3f. Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his or her signature in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the Court or a judge is otherwise satisfied that the affidavit was read over to and apparently perfectly understood by the deponent.

R. 3g. Stamping of affidavits, and use of office copies. (R. S. C., April, 1880, r. 18.)

3g. In cases in which by the present practice an original affidavit is allowed to be used, it shall before it is used be stamped with a proper filing stamp, and shall at the time when it is used be delivered to and left with the proper officer in Court or in Chambers, who shall send it to the Central Office. An office copy of an affidavit may in all cases be used, the original affidavit having been previously filed in the Central Office, and the copy duly authenticated with the seal of that office.

Order XXXVII. r. 3g.

The following notice as to affidavits has been issued from the Central Office: See *Solicitors' Journal*, 24 July, 1880:—

Notice as to Affidavits.

Central Office notice as to affidavits.

General Directions as to Searching for Affidavits.—All affidavits filed in the Central Office are deposited in the affidavit room and entered in the index books under the initial letter of the suit or matter in which the affidavit is used. There are two distinct sets of index books:

(1.) Affidavits filed in this office by the parties themselves, and
(2.) Affidavits transmitted from court or chambers or the master's office which are usually received the day after they have been used;

But affidavits used on application in the Common Law Chambers and in court may have been filed in the first instance in this office and office copies of them used on the application, in which case the original affidavit would be in the index book (No. 1). An affidavit not found in the index book (No. 2) of affidavits transmitted should be searched for in the index book (No. 1). Affidavits filed in the Queen's Bench, Common Pleas, and Exchequer Divisions, previous to the 6th of April, 1880, have been deposited in the affidavit office.

In Answer to Interrogatories or of Discovery of Documents.—Every affidavit in answer to interrogatories shall, when tendered for filing, be plainly marked on the outside by the party filing it with the capital letter A., and every affidavit of the discovery of documents shall, in like manner, be marked with the capital letter D., and notice shall be given to the clerk receiving such affidavit that it is an affidavit in answer to interrogatories or of documents (as the case may be); unless this be done, the affidavits may be overlooked in searches made for the purpose of giving certificates.

Stamps.—All adhesive stamps must be put on the first page of the affidavit in the margin.

Exhibits.—Exhibits should be annexed, when practicable, between the leaves of the affidavit for better security.

Bills of Sale Affidavits.—Affidavits used on application in court or at chambers respecting bills of sale are filed in each case under the name of the party by whom the bill is given.

Election Petition Affidavits.—Affidavits used on applications under the Election Petition Act are filed under the name of the petitioner.

Office Copies left to be Examined and Marked.—All office copies left to be marked must be stamped at the rate of 2d. per folio, and must have indorsed on the outside the name of the solicitor who will call for them. Where they are left after the original has been filed, the party leaving them must search the index for the index number of the original and the year in which it was filed, which must be indorsed on the back of the copy.

Bespeaking Copies to be made in the Office.—Where office copies are required to be made in the office the party bespeaking such copy must fill up on the printed (blue) bespeak form necessary particulars, including the number of the affidavit in the index

Order XXXVII. r. 3g—4.

book, which he must ascertain for himself. The stamps in payment of such copies must be left pinned on the bespeak form.

Producing Affidavits from the Affidavit Office before a Judge or Master, and in Court.—Where it is required to produce affidavits already on the file, before a judge or master in chambers, the party must fill up the (white) bespeak form, and leave it with the officer (where practicable) the day before such affidavit is required. Pursuant to rule 51 of the Rules of April, 1880, no original affidavit which is on the file can be produced in any court without an order from a judge or master, but office copies may be used.

Referring to Affidavits on the File for the purpose of drawing the Order.—Where an affidavit has to be referred to in an order, it will be sufficient if the parties produce at the summons and order desk a certificate of filing from the affidavit office, where forms of certificate are supplied. These must be filled up by the party, and handed to the filing clerk to be sealed.

Inspecting Original Affidavits.—When it is desired to inspect any original affidavit, a fee of 1s. (stamped on a "search præcipe") must be paid, and on no account is the affidavit to be removed from the office, or to be marked or written upon; when done with it should be returned to the officer.

Altering Office Copies.—No alteration, interlineation, or erasure shall on any account be made upon any office copy which has been issued from this office.

R. 4. Deposition.

4. The Court or a judge may, in [any] cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the Court, or any other person or persons, and at any place, of any witness or person, and may order any deposition so taken to be filed in the Court, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a judge may direct.

This rule is a repetition in somewhat different language of the 1 Will. IV. c. 22, s. 4, the statute under which the Common Law Courts had power to order the depositions of witnesses to be taken.

In the Common Law Courts, witnesses have been examined before the trial:

1. When within the jurisdiction;
2. When out of the jurisdiction.

Within the jurisdiction, depositions have been taken when it has been shown that a necessary witness was either going abroad, or was from illness, age, or other infirmity, likely to be unable to attend the trial.

Commissions to examine witnesses abroad have been issued whenever such examination has been shown to be necessary for the purposes of justice.

As to the practice under 1 Will. IV. c. 22, see Chitty's Archbold, 329, *et seq.*, ed. 12.

A deposition to be used under this order must be printed, unless otherwise ordered, or unless it has been previously used in manu-

script: R. S. C. (Costs), Os. I. and II., *post*, p. 444. As to the mode of printing, delivery of copies, costs, &c., see *Ibid.* O. V.

In the *M. Moxham*, 1 P. D. 107, C. A., the Judge of the Admiralty and the Court of Appeal refused to issue a commission to Spain to prove the Spanish Law, in the absence of anything to show that it could not readily be proved by witnesses at the trial. A commission to examine witnesses abroad will be refused if it is not asked for in reasonable time: *Steuart* v. *Gladstone*, 7 Ch. D. 394. As to examining the plaintiff by commission, see *Banque Franco-Egyptienne* v. *Lutscher*, 28 W. R. 133.

The examination of a witness de bene esse under this rule will be ordered whenever justice seems to require it. His evidence should not be taken ex parte: *Warner* v. *Mosses*, 16 Ch. D. 100, C. A.

An examiner's office is not a public court. There is no right to admit any one but the parties, their counsel, and solicitors or agents: *Re Western of Canada Oil Co.*, 25 W. R. 787, M. R.

In *Bolton* v. *Bolton*, 2 Ch. D. 217, Hall, V.-C., allowed a deposition to be read though not taken down in the examiner's handwriting; contrary to the former Chancery practice under 15 & 16 Vict. c. 86, s. 32; Morgan, 187. In the Common Law Courts this was never required.

As to the practice in Chancery before the Judicature Acts, see Dan. Ch. Pr., p. 814, ed. 5; and 15 & 16 Vict. c. 86, ss. 31, 32.

ORDER XXXVIII.

EVIDENCE BY AFFIDAVIT.

R. 1. Trial on affidavit. Plaintiff's affidavits.

1. Within fourteen days after a consent for taking evidence by affidavit as between the plaintiff and the defendant has been given, or within such time as the parties may agree upon, or a judge in Chambers may allow, the plaintiff shall file his affidavits and deliver to the defendant or his solicitor a list thereof.

This Order is founded on the former practice in Chancery under 15 & 16 Vict. c. 86, s. 15, and Chan. Cons. Ord. XXXIII., Rules 4 to 8: see Morgan's Acts and Orders, pp. 169, 533, ed. 4; Dan. Ch. Pr., p. 722, ed. 5.

The guardian ad litem of an infant has power to consent under this rule: *Knatchbull* v. *Fowle*, 1 Ch. D. 604 M. R.

By O. XXXVII., r. 1, *ante*, p. 342, subject to the qualifications there stated, the evidence in an action cannot be taken by affidavit without consent. The effect of these Orders upon affidavit evidence is very material.

In the Common Law Courts such evidence was not in use at all upon the trial of a cause. It may for the future be used by consent, subject to the provisions of this Order.

In the Court of Chancery it has been the kind of evidence ordinarily used. For the future it can only be adopted by consent at the trial of an action.

Order XXXVIII. rr. 1—4.

As to the effect of these rules see notes to the last Order, and O. XXXVI. r. 5.

An affidavit sworn before the partner of the plaintiff's solicitor is inadmissible: *Duke of Northumberland* v. *Todd*, 7 Ch. D. 777.

Where a consent to take evidence by affidavit does not in terms limit the evidence to affidavits, a deponent may be further examined vivâ voce at the hearing: *Glossop* v. *Heston Local Board*, 26 W. R. 433.

R. 2. Defendant's affidavits.

2. The defendant within fourteen days after delivery of such list, or within such time as the parties may agree upon, or a judge in chambers may allow, shall file his affidavits and deliver to the plaintiff or his solicitor a list thereof.

R. 3. Affidavits in reply.

3. Within seven days after the expiration of the said fourteen days, or such other time as aforesaid, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the defendant or his solicitor a list thereof.

In *Peacock* v. *Harper*, 7 Ch. D. 648, it was held by Hall, V.-C., notwithstanding the words of this rule, that confirmatory affidavits may be used in reply; see too *Gilbert* v. *Comedy Opera Co.*, 16 Ch. D. 100 V. C. B.

An affidavit which transgresses this rule by introducing irrelevant matter cannot be struck off the file, but will be disregarded, *ibid.*

R. 4. Cross-examination. Notice to cross-examine.

4. When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, may serve upon the party by whom such affidavit has been filed, a notice in writing, requiring the production of the deponent for cross-examination before the Court at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the Court or a judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the Court. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production.

This rule is founded on the General Order in Chancery of 5 Feb. 1861, r. 19; Morgan's Acts and Orders, p. 626, ed. 4.

The fact that a witness has disobeyed an order to attend and be cross-examined is not ground for striking his affidavit off the file; because by this rule it can only be used by special order: *Meyrick* v. *James*, 46 L. J. Ch. 579, M. R.

See form of notice, B. No. 21, *post*, p. 484.

5. The party to whom such notice as is mentioned in the last preceding Rule is given, shall be entitled to compel the attendance of the deponent for cross-examination in the same way as he might compel the attendance of a witness to be examined. Order XXXVIII. rr. 5, 6. R. 5. Compelling attendance

6. When the evidence in any action is under this Order taken by affidavit, such evidence shall be printed, and the notice of trial shall be given at the same time or times after the close of the evidence as in other cases is by these Rules provided after the close of the pleadings. R. 6. Notice of trial.

Affidavit evidence taken under this Order is to be printed by the *parties*: R. S. C. (Costs), O. V., *post*, p. 605: where see as to printing, delivery of copies, costs, &c. By O. 11., *Ibid.*, affidavits need not be printed, if they have been previously used in manuscript.

As to the time for giving notice of trial, see O. XXXVI. rr. 3 and 4, *ante*, p. 319.

Any other affidavit than those required by this rule to be printed may be printed, either by consent, or by an order: R. S. C. (Costs), O. III., *post*, p. 604.

The provision of this rule as to time does not apply to exclude the use of affidavits made after notice of trial under a judge's order: *Waring* v. *Lacey*, 24 W. R. 318, M. R.

ORDER XXXIX. Order XXXIX

Motion for New Trial.

1. *A party desirous of obtaining a new trial of any cause tried in the Queen's Bench, Common Pleas, or Exchequer Divisions on which a verdict has been found by a jury, or by a judge without a jury, must apply for the same to a Divisional Court by motion for an order calling upon the opposite party to show cause at the expiration of eight days from the date of the order, or so soon after as the case can be heard, why a new trial should not be directed. Such motion shall be made within four days after the trial, if the Divisional Court is then sitting, or within the first four days after the commencement of the sitting of the Divisional Court next after the trial, or within such extended time as the Court or a judge may allow.* R. 1. Motion for new trial.

Order XXXIX. rr. 1, 1a.

This rule was repealed by R. S. C., December, 1876, and the following provision substituted :—

R. 1. Application for new trial: to what Court. (R. S. C., Dec. 1876, r. 5.)

1. Where, in an action in the Queen's Bench, Common Pleas, or Exchequer Division, there has been a trial by a jury, any application for a new trial shall be to a Divisional Court. And where the trial has been by a judge without a jury, the application for a new trial shall be to the Court of Appeal.

As to the constitution of Divisional Courts, see s. 17 of the Act of 1876, *ante*, p. 137.

R. 1a. *Motion. Time to move.* (R. S. C., Dec. 1876, r. 6.)

1a. Applications for new trials shall be by motion calling on the opposite party to show cause at the expiration of eight days from the date of the order, or so soon after as the case can be heard, why a new trial should not be directed. Such motion shall be made within the times following, unless the Court or a judge shall enlarge the time.

An application to a Divisional Court for a new trial, if the trial has taken place in London or Westminster, shall be made within four days after the trial, or on the first subsequent day on which a Divisional Court to which the application may be made shall have actually sat to hear motions. If the trial has taken place elsewhere than in London or Middlesex, the motion shall be made within the first four days of the next following sittings.

Rule 1*a* is hereby annulled, and the following shall stand in lieu thereof :—

R. 1a. Motion. Time to move. (R. S. C., March, 1879, r. 6.)

Applications for new trials shall be by motion calling on the opposite party to show cause, at the expiration of eight days from the date of the Order, or so soon after as the case may be heard, why a new trial should not be directed. Such motion shall be made within the times following, unless the Court, or a judge, shall enlarge the time :—

An application to a Divisional Court for a new trial, if the trial has taken place in London or Westminster, shall be made within four days after the trial, or on the first subsequent day on which a Divisional Court, to which the application may be made, shall have actually sat to hear motions. If the trial has taken place elsewhere than in London or Middlesex, the motion shall be made within seven days after the last day of sitting on the Circuits for England and Wales during which the action shall have been tried, or within the first four days of the next

following sittings, if such day occurs during or within a week immediately before a vacation.

Order XXXIX. r. 1a.

Under the rules in their original form, every application for a new trial of any action, tried in the Queen's Bench, Common Pleas, or Exchequer Division, was to be made to a Divisional Court. Under the substituted rule, which is one of those of Dec. 1876, framed to give effect to s. 17 of the Act of 1876, it is only when the trial has been by a jury that the Divisional Court has jurisdiction. If the trial has been by a judge alone, an application for a new trial, whatever be the ground of the application, must be to the Court of Appeal: *Oastler* v. *Henderson*, 2 Q. B. D. 575.

Judge alone.

When a judge, sitting alone without a jury, tries the issues of fact in an action separately from the issues of law, and comes to a separate decision upon them, any party dissatisfied with his decision must apply to the Court of Appeal by motion for a new trial within twenty-one days: *Krehl* v. *Burrell*, 10 Ch. D. 420, C. A., as explained by *Potter* v. *Cotton*, 5 Ex. D. 137, C. A., and *Jones* v. *Hough*, 5 Ex. D. 115 at p. 124, C. A. In every other case, except perhaps where the judge has improperly received or rejected evidence (or where a new trial is asked for on ground of surprise, *Jones* v. *Hough*, 5 Ex. D., at p. 127), the party dissatisfied with his findings either of fact or law should proceed by way of appeal from his judgment: *Lowe* v. *Lowe*, 10 Ch. D. 432, C. A.; *Dollman* v. *Jones*, 12 Ch. D. 553, C. A.; *Potter* v. *Cotton*, 5 Ex. D. 137, C. A.; *Pannell* v. *Nunn*, 28 W. R. 940, C. A. In *Metropolitan Inner Circle Ry.* v. *Metropolitan District Ry.*, W. N. 1880, p. 134, C. A., Q. B. D., where the case had been tried by a judge without a jury, the Court of Appeal seems to have granted a rule for a new trial on the ground that he improperly rejected evidence; but this seems directly opposed to the view taken by the same court in *Dollman* v. *Jones*, 12 Ch. D. 553, unless a distinction is drawn between the Queen's Bench and Chancery Divisions. On an appeal from the decision of a judge alone, the Court of Appeal can order a new trial without any rule for a new trial having been obtained: *Jones* v. *Hough*, 5 Ex. D. 115, C. A.; see O. LVIII., r. 5a, *post*, p. 422. Conversely, on a motion for a new trial, the Court of Appeal may, if it have all the necessary materials before it, direct judgment for the party moving instead of a new trial: *Waddell* v. *Blockey*, 10 Ch. D. 416, C. A.

Jury cases.

As regards jury cases, where the jury has been dismissed, and the judge eventually decides the case, the remedy of the party dissatisfied is by way of appeal to the Court of Appeal, and not by motion for a new trial: *Metropolitan Bank* v. *Heiron*, W. N., 1880, p. 132, C. A.; see the appeal reported 5 Ex. D. 319, C. A. Where the judge non-suits after evidence has been taken, the proper course is to apply for a new trial to the Divisional Court: *Etty* v. *Wilson*, 3 Ex. D. 359; but if the plaintiff be non-suited on his counsel's opening, or on the admitted facts, the case is not quite clear: see per Thesiger, L. J., *Ibid.*, at p. 360; see too *Hall* v. *Jupe*, 49 L. J. C. P. 721; *Davies* v. *Felix*, 4 Ex. D. at p. 35 per James, L. J., but probably the same rule applies. Where the judge refuses to non-suit, and the jury find for the plaintiff, and the judge thereupon directs judgment to be entered for the plaintiff, the proper course for the defendant is to move for a new trial before a Divisional Court: *Davies* v. *Felix*, 4 Ex. D. 32, C. A.

Order XXXIX. r. 1a.

So too where the facts are not really in dispute, and the judge directs the jury to find for the plaintiff, and thereupon directs judgment to be entered for the plaintiff: *Yetts* v. *Forster*, 3 C. P. D. 437, C. A.

Issues from Chancery.

As to the powers of the Court upon a motion for a new trial, see O. XL. r. 10, *post*, p. 359.

If an action brought in the Chancery Division is tried by a jury (which trial can only take place either on circuit or at the London or Middlesex sittings commonly held before judges of the Queen's Bench, Common Pleas, or Exchequer Division: O. XXXVI., r. 2, *ante*, p. 317), the application for a new trial must be made to a Divisional Court, not to the judge who tried the cause: *Hunt* v. *City of London Real Property Co.*, 3 Q. B. D. 19, C. A.; *Jones* v. *Baxter*, 5 Ex. D. 275, C. A. But if an issue only be sent down for trial the application should be made to the judge before whom the action is pending: *Ibid.* at p. 277, and *Jenkins* v. *Morris*, 14 Ch. D. 674, C. A.

Trial in County Court.

An action sent for trial to a County Court, under 19 & 20 Vict. c. 108, s. 26, and tried before the judge, is not within the above rule. The procedure, therefore, is as before the Act, and the application is not to the Court of Appeal, but to a Divisional Court, and within the same time as before the Act: *London* v. *Roffey*, 3 Q. B. D. 6; *Davis* v. *Godbehere*, 4 Ex. D. 215, C. A.

Probate and Divorce cases.

The rules do not apply to Divorce cases: see O. LXII., *post*, p. 442. As to appeals and new trials under the Divorce Acts, see s. 9 of the Act of 1881, *ante*, p. 165. As to Probate cases, see note to s. 19 of the Act of 1873, *ante*, p. 15. An appeal lies to the Court of Appeal; but it is doubtful how far the old power of re-hearing under r. 60 of the Probate Court Orders, 1862, still exists.

Misdirection.

By the express terms of s. 22 of the Act of 1875, *ante*, p. 113, any party, on a trial by jury, is entitled to have the judge fully direct the jury on all points of law; and a misdirection may be the ground of a motion in the Court of Appeal founded on an exception annexed to the record. Where there was no record, the Court ordered notice of motion to be given: *Re Harris, Cheese* v. *Lovejoy*, 2 P. D. 161.

Notice.

Where an action was brought against a company and H., one or other of whom was liable to the plaintiff, and a verdict was found against the company and in favour of H., the company obtained a rule nisi for a new trial, and the Court directed notice to be served on H. The rule having been discharged, and the company having appealed, the Court of Appeal directed H. to be served, and ultimately ordered a new trial generally: *Purnell* v. *Great Western Ry. Co.*, 1 Q. B. D. 636. A defendant who has moved should always serve notice on the other defendant: *Ibid.* It would also seem that a new trial might now be granted as against one defendant, without disturbing the verdict as to the other: *Ibid.*, p. 641, per Mellish, L. J. See r. 4 of this Order.

Co-defendants.

Time.

The time for appeal after a trial by jury runs from the discharge of the jury: *Shaw* v. *Hope*, 25 W. R. 729, Ex. D. The party applying for a new trial has the whole of four days to consider whether he will apply or not; and if no court sits on the fourth day to which he can apply, his time is extended until the next sitting of such a court: *Grant* v. *Holland*, 49 L. J. Q. B. 800.

2. A copy of such order shall be served on the opposite party within four days from the time of the same being made.

R. 2. Service of order nisi.

R. 3. Restrictions on new trials.

3. A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give final judgment as to part thereof, and direct a new trial as to the other part only.

Misdirection

See *Faund* v. *Wallace*, 35 L. T. 361, Q. B. D. As to misdirection to the jury, see s. 22 of the Act of 1875, *ante*, p. 113, and note to last rule. See too *Anthony* v. *Halstead*, 37 L. T. 433.

Ruling as to stamp.

By s. 31 of the C. L. P. Act, 1854.

No new trial shall be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp.

Subject to the limitations imposed by this rule, if a document be tendered in evidence, and rejected by the judge as insufficiently stamped, the rejection would as before the Judicature Acts be a ground for a new trial. As to the practice before the Acts, see *Sharples* v. *Rickard*, 2 H. & N. 57.

Evidence.

As to new trials on the ground that the verdict was against the weight of evidence, see *Solomon* v. *Bitton*, 8 Q. B. D. 176, C. A. As to discovery of fresh evidence, see *Andrews* v. *Titness*, 36 L. T. 711.

R. 4. New trial as to part.

4. A new trial may be ordered on any question in an action, whatever be the grounds for the new trial, without interfering with the finding or decision upon any other question.

Rules 3 and 4 introduce material changes. Formerly, a misdirection by the judge in point of law, or the improper admission or rejection of evidence in any material matter, was ground for a new trial as of right. Under the first part of r. 3 this practice is changed. Again, it often happened that there might have been a miscarriage affecting only a part of the claim in question, and not at all affecting the rest, or affecting some one question in the cause and not at all another. Formerly the Courts had only the power to grant a new trial of the action generally. Under these rules they can grant a new trial as to so much of the matter as the miscarriage affects.

R. 5. Stay of proceedings.

5. An order to show cause shall be a stay of proceedings in the action, unless the Court shall order that it shall not be so as to the whole or any part of the action.

By s. 33 of the C. L. P. Act, 1854.

In every rule nisi for a new trial or to enter a verdict or non-

Order XXXIX. suit, the grounds upon which such rule shall have been granted shall be shortly stated therein.

As to this section, see note in *Day's C. L. P. Acts*, 4 ed. p. 285.

As to stay of proceedings pending an appeal, see O. LVIII., r. 15, *post*, p. 430; and *Goddard* v. *Thompson*, 47 L. J. C. P. 382, C. A.

Order XL.

ORDER XL.

MOTION FOR JUDGMENT.

R. 1. Judgment by motion.

1. Except where by the Act or by these Rules it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment.

By s. 100 of the Act of 1873, *ante*, p. 93, judgment shall include decree.

Judgment may be obtained by default in various cases provided for by the foregoing rules: Os. XIII., XXIX., XXXI., r. 20, *ante*, pp. 215, 282, 302. Or judgment may be pronounced, or directed to be entered, by the judge, at or after the trial: O. XXXVI., r. 22a, *ante*, p. 327. But there are many cases to which neither of those methods applies. Default may be made in pleadings, in a case not of such a simple character that the proper judgment can be entered by the parties entitled themselves, without the intervention of a Court; the decision of the Court may be necessary to say what the proper relief is; see O. XXIX., rr. 10, 11, 13, *ante*, pp. 285, 286. The judge at the trial of the action may not have ordered judgment to be entered: O. XXXVI., r. 22a, *ante*, p. 327. Or he may have ordered judgment to be entered, but that judgment may be wrong in law, having regard to the facts actually found: *post*, r. 4a. Or there may not be one single trial of the action, but different issues or questions may have been ordered to be determined in different ways or at different times: O. XXXVI., r. 6, *ante*, p. 321; r. 7, *post*, p. 358. To any of such cases the present Order will apply, and the judgment of the Court may be obtained upon motion.

As to the time of moving for judgment, see r. 9 of this Order. As to when the motion is to be for a rule to show cause, and when not, see r. 6 of this Order, and O. LIII., r. 2, *post*, p. 398. As to the practice on motions, see *Ibid.*

As the rules originally stood, motion for judgment would, in the Queen's Bench, Common Pleas, and Exchequer Divisions, ordinarily be made before a Divisional Court. But by s. 17 of the Act of 1876, *ante*, p. 137, and the R. S. C., Dec., 1876, this is no longer the case. Motion for judgment, like other steps not expressly authorised by those rules to be taken before a Divisional Court (see O. LVIIa, *post*, p. 415), must be before a single judge, and if made after trial, before the judge who tried the action; except where it is complained that, upon the facts as found, the judge has entered a wrong judgment, in which case the motion to enter the right judgment is now to the Court of Appeal: r. 4a, *post*, p. 356.

Order XL. r. 1.

The following notice as to actions in the Chancery Division was issued in Dec., 1876 :—

"Chancery Division.—Notice.—The Master of the Rolls and the Vice-Chancellors have given directions that motions for judgment in actions shall not be brought on as ordinary motions, but shall be set down in the cause book. They can be marked short, on production of the usual certificate of counsel, and will then be placed in the paper on the first short cause day after the day for which notice is given. If not marked short, they will come into the general paper in their regular turn. It will be advisable that the notices of motion for judgment should, if it is intended to mark them short, contain a statement to that effect, and also a statement that no further notice will be given of their having been so marked. Such statement will dispense with the necessity for giving defendants further notice that motions for judgment have been marked short. Where a defendant makes his defence, and the plaintiff moves under O. XL., r. 11, for such order as he is entitled to on the admissions of the defendant, the action need not be set down; but if, on the motion being made, it appears that there must be a discussion or argument, it may be ordered to go into the general paper, subject to any order for its being advanced. The attention of solicitors is also called to the provisions in the Judicature Rules as to notices of trial; as notice of trial can only be given after pleadings closed, the proper course, where there are no pleadings, is to set the action down on motion for judgment under O. XL., r. 1." (W. N. 1877, Pt. 11., p. 58; and see Seton on Decrees, p. 39, ed. 4.)

Where there are no pleadings, and the cause is marked short, Malins, V.-C., has laid down that the papers to be left for the judge are the writ and the notice of motion: *Oliver* v. *Wright*, W. N. 1877, p. 80.

Where an action is sent for trial to a County Court, under 19 & 20 Vict. c. 108, s. 26, judgment may be signed in accordance with the registrar's certificate of the result, as provided by the section; no motion for judgment is necessary: *Scutt* v. *Freeman*, 2 Q. B. D. 177. On the trial of an action before the Judicature Acts a verdict was taken subject to a reference, the arbitrator to have power to direct a verdict for either party; the arbitrator made his award after the Acts, directing a verdict for the plaintiff; and the associate entered the postea accordingly as of the date of the trial, and gave it to the plaintiff: it was held that judgment was rightly entered on production of the postea, without any motion: *Lloyd* v. *Lewis*, 2 Ex. D. 7, C. A. And Brett, L. J., expressed the opinion that judgment might, in such a case, be entered on the award, without motion, though the order of reference were after the Acts. As to moving for judgment on a special case, see *Harrison* v. *Cornwall Minerals Railway*, 49 L. J. Ch. 834. For a form of judgment on motion see App. D., No. 19, *post*, p. 548.

R. 2. Motion where leave reserved.

2. Where at the trial of an action the judge or a referee has ordered that any judgment be entered subject to leave to move, the party to whom leave has been reserved shall set down the action on motion for judgment, and give notice thereof to the other parties within the time limited by the judge in reserving leave, or if no time has been limited, within ten days after the trial.

Order XL. r. 2—4a. The notice of motion shall state the grounds of the motion, and the relief sought, and that the motion is pursuant to leave reserved.

This rule would appear now to have no operation. As to a judge, the power of ordering judgment subject to leave to move seems now to be taken away: See O. XXXVI., r. 22a, *ante*, p. 327, and note thereto. And the Court of Appeal has decided that a referee has not in any case power to enter judgment: See note to O. XXXVI., r. 30, *ante*, p. 340.

R. 3. *Motion where no judgment at trial.*

3. Where at the trial of an action the judge or referee abstains from directing any judgment to be entered, the plaintiff may set down the action on motion for judgment. If he does not so set it down and give notice thereof to the other parties within ten days after the trial, any defendant may set down the action on motion for judgment, and give notice thereof to the other parties.

See O. XXXVI., r. 22a, *ante*, p. 327.

Under the practice formerly in force in the Common Law Courts, although a point were reserved by the judge at the trial the motion to the Court in pursuance of it could only be for a rule nisi in the first instance. Now by O. LIII., r. 2, *post*, p. 398, and the above rules, such motion will be made for a rule absolute, and will be made on notice simply. And formerly the motion for a rule nisi has been, as will still substantially be the case with rules for new trials, within four days if the trial were in term, and within the first four days of the next term if the trial were not in term. Under these rules the motion for judgment must be entered and notice of it given within ten days after the trial, unless the judge limits a different time, whether the Court is sitting or not.

R. 4. *Motion where judgment wrong on finding of jury.*

4. *Where at the trial of an action before a jury the judge has directed that any judgment be entered, any party may, without any leave reserved, move to set aside such judgment, and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the judge having caused the finding to be entered wrongly, with reference to the finding of the jury upon the question or questions submitted to them.*

This is repealed by R. S. C., Dec. 1876, r. 7, as follows:—

R. 4a. *Motion where judgment at trial wrong on facts found.* (R. S. C., Dec. 1856, r. 7.)

4a. Order XL., Rules 4 and 6 are repealed, and Rule 5 is repealed so far as it affects trials before a judge; and the following Rule shall be substituted for Rule 4:—

4. Where, at or after the trial of an action by a jury, the judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and enter any other judgment, on the

ground that the judgment directed to be entered is wrong by reason of the judge having caused the finding to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them. Order XL. rr. 4a.—5.

Where, at or after the trial of an action before a judge, the judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and to enter any other judgment, upon the ground that, upon the finding as entered, the judgment so directed is wrong.

An application under this Rule shall be to the Court of Appeal. In what Court.

An application to the Court of Appeal in the case provided for by this rule is not ex parte for an order to show cause, but by motion upon notice: *Jones* v. *Davis*, W. N. 1877, p. 86, C. A.; 36 L. T. 415. Under the original rules the application was to a Divisional Court; and was for a rule nisi.

According to the practice of the Common Law Courts, unless leave were reserved by the judge at the trial any party dissatisfied with the trial could, under any circumstances, only move for a new trial: never for a verdict or judgment. The above two rules alter this practice in two instances. It may often happen that an issue agreed upon or raised by the pleadings may be general in its terms; for example, partnership or no partnership at a given time. When the case is fully gone into it may be found that the question the jury have really to determine is some smaller one; say, for instance, the date of execution of a particular deed. Having taken the opinion of the jury upon this last question, it may become the duty of the judge to construe the deed, and direct the finding upon the issue to be entered accordingly. And upon this finding the result of the cause may depend. Again, when all the issues have been found the judge may, under O. XXXVI., r. 22a, *ante*, p. 327, direct judgment to be entered. In either of these cases, if the judge is mistaken his mistake may under the above rules be corrected by the Court of Appeal without leave reserved, and without a new trial. See note to O. XXXIX. r. 1, *ante*, p. 350, and cases there cited.

An application under this rule assumes the correctness of the findings of the jury, and proceeds upon the ground that having regard to the findings as correct the judgment has been wrongly entered: see *Davies* v. *Felix*, 4 Ex. D. at p. 35, per Brett, L. J., C. A.; *Hamilton* v. *Johnson*, 5 Q. B. D. at p. 266, per Bramwell, L. J., C. A. This rule therefore does not apply to the case of a non-suit: *Etty* v. *Wilson*, 3 Ex. D. 359, C. A.; or to a case where the judge refuses to non-suit, and the jury thereupon find for the plaintiff, and judgment is entered accordingly: *Davies* v. *Felix*, 4 Ex. D. 34, C. A.

5. Where at the trial of an action *the judge or* a referee has directed that any judgment be entered, any party may, without any leave reserved, move to set aside such judgment, and to enter any other judgment, on the R. 5. Motion where judgment wrong on finding as entered.

Order XL. rr. 5—8.

ground that upon the finding as entered the judgment so directed is wrong.

This rule is repealed as to a judge by the last preceding rule. As to a referee, it has now been decided that he has no power to order judgment: See note to O. XXXVI. r. 30, *ante*, p. 340.

R. 6. *Motion how made.*

6. *On every motion made under either of the last two preceding Rules, the order shall be an order to show cause, and shall be returnable in eight days. The motion shall be made within four days after the trial if the Divisional Court is then sitting, or within the first four days after the commencement of the sitting of the Divisional Court next after the trial, or within such extended time as a Court or judge may allow.*

See Rule 4a, *supra*, by which this rule is repealed.

R. 7. Setting down where issues tried.

7. Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, the plaintiff may set down the action on motion for judgment as soon as such issues or questions have been determined. If he does not so set it down, and give notice thereof to the other parties within ten days after his right so to do has arisen, then after the expiration of such ten days any defendant may set down the action on motion for judgment, and give notice thereof to the other parties.

See Form D. No. 18, *post*, p. 548.

R. 8. Application to set down where some issues tried.

8. Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, and some only of such issues or questions of fact have been tried or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others of them unnecessary, or renders it desirable that the trial or determination thereof should be postponed, may apply to the Court or a judge for leave to set down the action on motion for judgment, without waiting for such trial or determination. And the Court or judge may, if satisfied of the expediency thereof, give such leave, upon such terms, if any, as shall appear just, and may give any directions which may appear desirable as to postponing the trial of the other questions of fact.

See *Republic of Bolivia* v. *Bolivian Navigation Co.*, 24 W. R. 361, M. R.

9. No action shall, except by leave of the Court or a judge, be set down on motion for judgment after the expiration of one year from the time when the party seeking to set down the same first became entitled so to do.

R. 9. Time to set down.

10. Upon a motion for judgment, or for a new trial, the Court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made as it may think fit.

R. 10. Power of Court on motion.

See note to rule 4, also note to O. XXXIX. r. 1a.

In *Dann* v. *Simmons*, 48 L. J. C. P. 343, the jury found for the plaintiff, and the defendant moved for a new trial. The Court, being of opinion that there was really no evidence in support of the findings, entered judgment for the defendant. In *Hamilton* v. *Johnson*, 5 Q. B. D. 263, C. A., the jury found the facts specially and judgment was entered for the plaintiff. The defendant being dissatisfied with the findings moved for a new trial. The Divisional Court was of opinion that the action was misconceived, and therefore directed judgment to be entered for the defendant. The Court of Appeal confirmed this order. See too *Yorkshire Banking Co.* v. *Beatson*, 5 C. P. D. 109 at p. 127, C. A., and *Waddell* v. *Blockey*, 10 Ch. D. 416, C. A., as to the power of the Court to give judgment under this rule.

11. Any party to an action may at any stage thereof apply to the Court or a judge for such order as he may, upon any admissions of fact in the pleadings, be entitled to, without waiting for the determination of any other question between the parties. The foregoing Rules of this Order shall not apply to such applications, but any such application may be made by motion, so soon as the right of the party applying to the relief claimed has appeared from the pleadings. The Court or a judge may, on any such application, give such relief, subject to such terms, if any, as such Court or judge may think fit.

R. 11. Summary relief on motion upon admissions in pleadings

Under the notice of Dec. 1876 (*ante*, p. 355), with reference to the Chancery Division, it is directed that "where a defendant makes his defence, and the plaintiff moves under O. XL. r. 11, for such order as he is entitled to on the admissions of the defendant, the action need not be set down; but if, on the motion being made, it appears that there must be a discussion or argument, it may be ordered to go into the general paper, subject to any order for its being advanced."

Order XL. r. 11.

Under this rule, orders for accounts have been made, where the facts admitted gave a right to them: *Turquand* v. *Wilson*, 1 Ch. D. 85, V.-C. H.; *Rumsey* v. *Reade*, *Ibid.*, 643, V.-C. B.; for inquiries in a partition suit: *Gilbert* v. *Smith*, 2 Ch. D. 686, C. A.; *Burnell* v. *Burnell*, 11 Ch. D. 213, M. R.; for dissolution of partnership: *Thorp* v. *Holdsworth*, 3 Ch. D. 637, M. R.; for judgment against a husband, in an action against husband and wife, where the statement of defence showed a defence by the wife, but none by the husband: *Jenkins* v. *Davies*, 1 Ch. D. 696, V.-C. H.; for a trustee to bring money into Court; *Symonds* v. *Jenkins*, 34 L. T. 277, V.-C. M. See further as to ordering payment into Court on admissions: *London Syndicate* v. *Lord*, 8 Ch. D. 84, C. A.; *Freeman* v. *Cox*, 8 Ch. D. 148, M. R.; for a decree or decretal order in an administration action: *Hetherington* v. *Longrigg*, 10 Ch. D. 162; for foreclosure in an action by the assignee of a mortgage: *Rutter* v. *Tregent*, 12 Ch. D. 758: and for a sale of bonds on which the plaintiff claimed a charge: *Coddington* v. *Jacksonville Ry.*, 39 L. T. 12, C. A. See also *Honduras Co.* v. *Lefevre*, 2 Ex. D. 301; *Rolfe* v. *Maclaren*, 3 Ch. D. 106, V.-C. H.; *Clutton* v. *Lee*, 7 Ch. D. 541, n. M. R.

A defendant claiming to get judgment when no reply has been delivered is perhaps entitled to proceed under this rule: *Lumsden* v. *Winter*, 8 Q. B. D. 650, *sed contra*: *Litton* v. *Litton*, 3 Ch. D. 793, V.-C. H. See too *Gillot* v. *Ker*, 24 W. R. 428, omission to put in statement of defence; but see the note to O. XXIV. r. 3, *ante*, p. 274. A defendant who has put in a rejoinder to the plaintiff's reply may under this rule move to have the action dismissed on the ground of admissions in the pleadings: *Pascal* v. *Richards*, 44 L. T. 87. See the meaning of the term "relief" in this rule discussed by Jessel, M. R. in that case: see, too, *Brown* v. *Pearson*, 30 W. R. 436.

Where one defendant does not appear, or does not deliver a defence, and another delivers a defence on which the plaintiff's right to relief is admitted, the plaintiff may proceed against the latter under this rule, and against the former by default: *Re Smith's Estate*, *Bridson* v. *Smith*, 24 W. R. 392, V.-C. H.; *Parsons* v. *Harris*, 6 Ch. D. 694, V.-C. H.

Discretion.

It is in the discretion of the judge to give relief on motion under this rule; he is not bound to do so if he thinks the matter too difficult so to deal with it. And the Court of Appeal will not review his discretion; *Mellor* v. *Sidebottom*, 5 Ch. D. 342, C. A. The relief should only be given in clear cases, not for instance in a case where the defendant omits to deny a right alleged by the plaintiff which has no foundation in law: *Chilton* v. *London*, 7 Ch. D. 735.

The procedure under this rule is optional, and a party who does not avail himself of it does not waive his right to rely on admissions at the trial: *Tildesley* v. *Harper*, 7 Ch. D. 403 (overruled on another point 10 Ch. D. 393 C. A.).

An order under this rule may be made reserving further consideration, without any further prior hearing: *Bennett* v. *Moore*, L. R. 1 Ch. D. 692, V.-C. H.; *Gilbert* v. *Smith*, 2 Ch. D. 686, C. A.; *Brassington* v. *Cusons*, 24 W. R. 881, V.-C. H.; and with liberty to apply to have the further hearing taken in chambers: *Gilbert* v. *Smith*, *ubi supra*. See an application under this rule made by summons instead of by motion refused: *Lloyd* v. *Lloyd*, 26 W. R. 572, V.-C. M.

ORDER XLI.

Order XLI.

ENTRY OF JUDGMENT.

R. 1. Judgment: how entered. Delivery of pleadings.

1. Every judgment shall be entered by the proper officer in the book to be kept for the purpose. The party entering the judgment shall deliver to the officer a copy of the whole of the pleadings in the action other than any petition or summons; such copy shall be in print, except such parts (if any) of the pleadings as are by these Rules permitted to be written: Provided that no copy need be delivered of any pleading a copy of which has been delivered on entering any previous judgment in such action. The forms in Appendix (D) hereto may be used, with such variations as circumstances may require.

By s. 100 of the Act of 1873 "judgment" shall include decree.
For the forms here referred to, see *post*, pp. 541 to 548.
All pleadings are in the first instance to be delivered simply between parties: O. XIX., r. 7, *ante*, p. 253, and not filed in Court. By the present rule, if the action goes on to judgment, and there have been pleadings delivered, a copy of the pleadings is to be delivered to the officer, for the purpose, it may be presumed, of being filed.

R. 1a. Judgments when to be entered in Central Office.

1a. All judgments in the Queen's Bench, Common Pleas, and Exchequer Divisions shall, if entered in London, be entered in the Central Office.

(R. S. C., April, 1880, r. 19.)

R. 2. Date of entry when judgment pronounced in Court. Effect.

2. Where any judgment is pronounced by the Court or a judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, and the judgment shall take effect from that date.

Compare this rule with R. G. T. T. 1853, r. 32. Possibly the effect of the present rule might be to take away the power of the Court, in exceptional cases, to enter judgment *nunc pro tunc*. See note to O. L. r. 1, *post*, p. 385. It seems however that a judgment may by consent be post-dated: *Winkley* v. *Winkley*, 44 L. T. 572. As to conditional judgments, see O. XLII., r. 7, *post*, p. 364.

R. 3. Date of entry in other cases.

3. In all cases not within the last preceding Rule, the entry of judgment shall be dated as of the day on which the requisite documents are left with the proper officer for the purpose of such entry, and the judgment shall take effect from that date.

R. 4. Duty of officer.

4. Where under the Act or these Rules, or otherwise, it is provided that any judgment may be entered or signed

Order XLI. rr. 4—6.

upon the filing of any affidavit or production of any document, the officer shall examine the affidavit or document produced, and if the same be regular and contain all that is by law required he shall enter judgment accordingly.

Examination of documents.

R. 5.

Judgment on order, certificate, or return to writ.

5. Where by the Act or these Rules, or otherwise, any judgment may be entered pursuant to any order or certificate, or return to any writ, the production of such order or certificate sealed with the seal of the Court, or of such return, shall be a sufficient authority to the officer to enter judgment accordingly.

R. 6.

Nonsuit.

Effect.

(R. S. C., Dec. 1879, r. 5.)

6. Any judgment of nonsuit, unless the Court or a judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant; but in any case of mistake, surprise, or accident, any judgment of nonsuit may be set aside on such terms, as to payment of costs and otherwise, as to the Court or a judge shall seem just.

This is a material change. Formerly a judgment of non-suit left the plaintiff free to commence another action for the same cause. See note to O. XXIII., *ante*, p. 271.

Order XLIa.

ORDER XLIA.

AMENDMENTS OF JUDGMENTS.

Clerical error in judgment or order.

Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a judge on motion without an appeal.

See *Att.-Gen.* v. *Tomline*, 7 Ch. D. 338, as to mistakes before this rule. By the rules of April, 1880, a general power is given to amend any error or defect in any proceeding: see O. LIX. r. 2, *post*, p. 431.

Under this rule where a judgment omitted to provide for the costs of an interlocutory proceeding, the omission was rectified: *Fritz* v. *Hobson*, 14 Ch. D. 542; see too *Winkley* v. *Winkley*, 44 L. T. 572, as to post-dating a judgment by consent.

As to moving to set aside a judgment on the ground of fraud, see *De Medina* v. *Grove*, 10 Q. B. 152, at p. 171. It is doubtful whether an action lies to impeach a judgment obtained by fraud: *Flower* v. *Lloyd*, 10 Ch. D. 327, C. A.

As to amending a petition after order made by striking out the mes of some of the petitioners, see *Re Savage*, 15 Ch. D. 557, na R. As to varying the minutes of an order made by the Court M. ppeal, see *General Share and Trust Co.* v. *Wetley*, 20 Ch. D. of A C. A. 130,

ORDER XLII.

Order XLII.

EXECUTION.

1. A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court whose jurisdiction is transferred by the said Act might have been enforced at the time of the passing thereof. R. 1. Judgment for recovery of money.

By s. 100 of the Act of 1873, *ante*, p. 93, "judgment" shall include decree, and by O. LXIII., *post*, p. 444, "person" shall include a body corporate or politic.

As to equitable execution, see note to r. 23, *post*.

2. A judgment for the payment of money into Court may be enforced by writ of sequestration, or in cases in which attachment is authorised by law, by attachment. R. 2. Judgment for payment into Court.

See O. XLIV., *post*, p. 371, as to attachment; O. XLVII., *post*, p. 382, as to sequestration.

Whether attachment can be had in any case depends upon whether the liability is within the exceptions of the Debtors Act; See note to O. XLIV., r. 2. *post*, p. 371.

Under this rule a writ of sequestration for non-compliance with an order of Court issues without any leave: *Sprunt* v. *Pugh*, 7 Ch. D. 567.

3. A judgment for the recovery, or for the delivery of the possession of land may be enforced by writ of possession. R. 3. Judgment for recovery of land.

4. A judgment for the recovery of any property other than land or money may be enforced:

By writ for the delivery of the property:

By writ of attachment:

By writ of sequestration. R. 4. Judgment for recovery of other property.

As to writ of delivery see O. XLIX., *post*, p. 384; as to the issue of such a writ on a judgment by default, see *Irory* v. *Cruikshank*, W. N. 1875, p. 249, Quain, J., at Chambers, and *ante*, p. 218; as to attachment, see O. XLIV., *post*, p. 371; and as to sequestration, see O. XLVII., *post*, p. 382.

5. A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal. R. 5. Judgment requiring person to do or leave undone.

Order XLII. rr. 5—8.

By r. 20, *post*, every order of the Court or a judge, whether in an action, cause, or matter, may be enforced in the same manner as a judgment to the same effect; and by s. 100 of the Act of 1873 "order" shall include rule.

Where a judgment requires an act to be done forthwith, not specifying a day, it requires a motion to enforce it: see *Gilbert* v. *Endean*, 9 Ch. D. at p. 266, C. A.

R. 6. Meaning of terms writ of execution, and issuing execution.

6. In these Rules the term "writ of execution" shall include writs of fieri facias, capias, elegit, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto. And the term "issuing execution against any party" shall mean the issuing of any such process against his person or property as under the preceding Rules of this Order shall be applicable to the case.

Setting aside execution.

By O. LIX., *post*, p. 431, full power is given to the Court to deal with any irregularity in any proceeding, including execution. At Common Law, where an execution was set aside for irregularity, it was usually set aside on the terms that no action should be brought, unless the party issuing it had acted maliciously, or been guilty of some misconduct: *Lorimer* v. *Lule*, 1 Chitty R. 134; *Wilson* v. *Odden*, 15 C. B., N. S. 827.

As to moving to set aside executions on the ground of fraud, see *De Medina* v. *Grove*, 10 Q. B. 152, at p. 171.

R. 7. Judgment for conditional relief.

7. Where a judgment is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the Court or a judge for leave to issue execution against such party. And the Court or judge may, if satisfied that the right to relief has arisen according to the terms of the judgment, order that execution issue accordingly, or may direct that any issue or question necessary for the determination of the rights of the parties be tried in any of the ways in which questions arising in an action may be tried.

R. 8. Judgment against partners.

8. Where a judgment is against partners in the name of the firm, execution may issue in manner following:

(*a.*) Against any property of the partners as such:

(*b.*) Against any person who has admitted on the pleadings that he is, or has been adjudged to be a partner:

(*c.*) Against any person who has been served, as a partner, with the writ of summons, and has failed to appear.

If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a judge for leave so to do; and the Court or judge may give such leave if the liability be not disputed, or if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined. Order XLII. rr. 8—11.

As to proceedings by and against partners generally, see note to O. IX., r. 6a, *ante*, p. 202, and *Jackson* v. *Litchfield*, 8 Q. B. D. 474, C. A.

Where judgment has been obtained against two persons as partners in respect of a partnership debt, a new action cannot be brought in respect of the same debt against a third person who is subsequently discovered to have been a partner with the other two: *Kendall* v. *Hamilton*, 4 App. Cas. 504, H. L.

9. No writ of execution shall be issued without the production to the officer by whom the same should be issued, of the judgment upon which the writ of execution is to issue, or an office copy thereof, showing the date of entry. And the officer shall be satisfied that the proper time has elapsed to entitle the judgment creditor to execution. R. 9. Documents to be produced.

10. No writ of execution shall be issued without the party issuing it, or his solicitor, filing a præcipe for that purpose. The præcipe shall contain the title of the action, the reference to the record, the date of the judgment, and of the order, if any, directing the execution to be issued, the names of the parties against whom, or of the firms against whose goods, the execution is to be issued; and shall be signed by [or on behalf of] the solicitor of the party issuing it, or by the party issuing it, if he do so in person. The forms in Appendix (E) hereto may be used, with such variations as circumstances may require. R. 10. Præcipe for writ. (R. S. C., June, 1876, r. 17.) Form.

The words in brackets were inserted by the rule noted in the margin.

For the forms here referred to see *post*, pp. 549 to 552.

As to the effect of these forms as controlling the rights of the parties, see *Schroeder* v. *Clough*, 46 L. J. C. P. 365.

11. Every writ of execution shall be indorsed with the name and place of abode or office of business of the solicitor actually suing out the same, and when the solicitor actually suing out the writ shall sue out the same as agent for another solicitor, the name and place R. 11. Indorsement of name and address. Solicitor.

Order XLII. rr. 11—14.

Agent.

Party in person.

of abode of such other solicitor shall also be indorsed upon the writ; and in case no solicitor shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's or defendant's residence, if any such there be.

This is in accordance with R. G. H. T. 1853, Rule 73.

R. 12. Date of writ.

12. Every writ of execution shall bear date of the day on which it is issued. The forms in Appendix (F) hereto may be used, with such variations as circumstances may require.

It is so provided as to all writs by O. II., r. 8, *ante*, p. 186. For the forms referred to, see *post*, pp. 559 *et seq.*

For a variation see *Bolton* v. *Bolton*, 3 Ch. D. 276.

R. 13. Poundage, fees, and expenses.

13. In every case of execution the party entitled to execution may levy the poundage, fees, and expenses of execution, over and above the sum recovered.

This is taken from the C. L. P. Act, 1852, s. 123.

A sheriff who, under a fi. fa., recovers the amount of a judgment debt, is entitled to poundage, although after seizure he is paid out by the execution debtor, without a sale of any portion of the goods seized: *Mortimore* v. *Cragg*, 3 C. P. D. 216, C. A. See too *Ex parte Lithgow*, 10 Ch. D. 169. As to costs of inquisition under an elegit, see *Mahon* v. *Miles*, 30 W. R. 123.

R. 14. Indorsement of direction to sheriff.

14. Every writ of execution for the recovery of money shall be indorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of 4*l.* per cent. per annum from the time when the judgment was entered up, provided that in cases where there is an agreement between the parties that more than 4*l.* per cent. interest shall be secured by the judgment, then the indorsement may be accordingly to levy the amount of interest so agreed.

This is in accordance with R. G., H. T. 1853, Rule 76; and see Chan. Cons. Ord. XXIX., Rule 10; Morgan's Acts and Orders, p. 276, ed. 4.

Interest on *costs* now runs only from the date of the certificate of taxation: See Form 1, Appendix F., *post*, p. 421; *Schroeder* v. *Clough*, 46 L. J. C. P. 365.

Order XLII. rr. 16—19.

judge, be renewed, by the party issuing it, for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal of the Court bearing the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his attorney, and bearing the like seal of the Court; and a writ of execution so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof.

This rule is in substance the same as s. 124 of the C. L. P. Act, 1852. It will be observed that a writ of execution may be renewed by leave without the restrictions imposed in the case of a writ of summons under the new practice: O. VIII., r. 1, *ante*, p. 199.

R. 17. Proof of renewal.

17. The production of a writ of execution, or of the notice renewing the same, purporting to be marked with such seal as in the last preceding Rule mentioned, showing the same to have been renewed, shall be sufficient evidence of its having been so renewed.

This is the same as s. 125 of the C. L. P. Act, 1852.

R. 18. Execution within six years.

18. As between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment.

This is in substance the same as s. 128 of the C. L. P. Act, 1852.

R. 19. Execution after six years, or change of parties.

19. Where six years have elapsed since the judgment, or any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly. And such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties, shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or judge may impose such terms as to costs or otherwise, as shall seem just.

The practice at common law in reviving pecuniary judgments for the purpose of execution, after the lapse of six years or the death of parties, was formerly governed by ss. 129 to 134 of the C. L. P. Act, 1852. Under those provisions the party seeking execution could apply to the Court or a judge for leave to enter a suggestion to the effect that such party was shown to be entitled

to execution, and to allow execution to issue. And if the case was made clear, the suggestion and the consequent execution were allowed. If the case were not made clear, the suggestion and execution consequent upon it were disallowed, and the party was left to his writ of revivor. This was a new action, in which by the ordinary processes of pleading the questions in dispute were brought to issue and decided.

The above rule preserves alternative processes, according as the right to execution is or is not sufficiently clear to be enforced summarily by a judge. But a somewhat simpler process is provided. If the case be clear, the judge may order execution to issue. If it be not, he may direct an issue to try the right.

In *Att. Gen.* v. *Corporation of Birmingham*, 15 Ch. D. 423, C. A., the court refused to allow an injunction directed to a corporation to restrain a nuisance, to be enforced against its successor in title. In *Mercer* v. *Lawrence*, 26 W. R. 506, an order that the executor of a plaintiff who had recovered judgment and then died should be at liberty to issue execution was made *ex parte*, but without costs.

R. 20. Execution on orders.

20. Every order of the Court or a judge, whether in an action, cause, or matter, may be enforced in the same manner as a judgment to the same effect.

See 1 & 2 Vict. c. 110, s. 18.

In *Sprunt* v. *Pugh*, 7 Ch. D. 567, a four day order to pay money into Court was made against a receiver who did not comply with the order. It was held that a writ of sequestration to enforce the order might issue without leave.

An order dismissing an action with costs for non-prosecution cannot be enforced by attachment of debts under O. XLV., r. 2: *Cremetti* v. *Crum*, 4 Q. B. D. 225.

See rule 23 as to equitable execution. As to enforcing orders for costs, see note to O. LV., *post*, p. 409.

R. 21. Execution by or against person not a party.

21. In cases other than those mentioned in Rule 18 any person not being a party in an action, who obtains any order or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the action; and any person not being a party in an action, against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order as if he were a party to the action.

This rule is taken from Chan. Cons. Ord. XXIX., Rule 2; Morgan's Acts and Orders, 513, ed. 4.

R. 22. Audita querela abolished. Stay of execution.

22. No proceeding by audita querela shall hereafter be used; but any party against whom judgment has been given may apply to the Court or a judge for a stay of execution or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded; and the Court or judge may give such relief and upon such terms as may be just.

Audita querela was a process in the nature of an action, whereby a party against whom judgment had been obtained might prevent execution on the ground of some matter of defence which there was no opportunity of raising in the original action: see *Turner* v. *Davies*, 2 Notes to Williams' Saunders, p. 439. By R. G., H. T., 1853, Rule 79, this process could only be issued by leave of the Court or a judge; and it has been almost wholly disused.

R. 23. Saving of previous rights.

23. Nothing in any of the Rules of this Order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever.

Outlawry.

By s. 2 of the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), outlawry in civil proceedings is now abolished.

Equitable execution.

Where a judgment debtor has no available legal estate, but has some equitable estate or interest, equitable execution may be obtained by the appointment of a receiver. The receiver may be appointed on an application in the original action. A fresh action claiming a receiver is unnecessary: *Salt* v. *Cooper*, 16 Ch. D. 544, C. A.; *Smith* v. *Cowell*, 6 Q. B. D. 75, C. A. But if a fresh action be commenced the receiver may be appointed on an interlocutory application: *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275, C. A.

If it be made to appear that a judgment debtor has no legal estate, but has some equitable interest in land, a receiver may be appointed without an *elegit* having been first sued out: *Ex parte Evans*, 13 Ch. D. 252, C. A. As to enforcing an order for alimony made by the Divorce Court by means of a receiver appointed by the Chancery Division, see *Oliver* v. *Lowther*, 28 W. R. 381, V. C. M. See further the note on receivers in s. 25, sub.-s. 8, of the Act of 1873.

R. 24. Order of writs.

24. Nothing in this Order shall affect the order in which writs of execution may be issued.

See last note, and O. XLIII., r. 2, *post*, as to writs in aid.

Order XLIII.

ORDER XLIII.

Writs of Fieri Facias and Elegit.

R. 1. Effect of fi. fa. and elegit.

1. Writs of fieri facias and of elegit shall have the same force and effect as the like writs have heretofore had, and shall be executed in the same manner in which the like writs have heretofore been executed.

As to levying interest, see O. XLII., r. 14, *ante*, p. 366. Interest on costs now runs from the certificate of taxation: See Form 1, Appendix F, *post*, p. 560: *Schroeder* v. *Cleugh*, 46 L. J. C. P. 365.

As to the non-return of a writ of fi. fa. by the sheriff, see *Hall* v. *Ley*, 12 Ch. D. 795. Under an *elegit* the sheriff may seize the debtor's goods at once before the inquisition is held, and from the

time of the seizure the creditor becomes a secured creditor within the meaning of the Bankruptcy Act, 1869, s. 16: *Ex parte Abbott*, 15 Ch. D. 447, C. A. Order XLIII. rr. 1, 2.

2. Writs of venditioni exponas, distringas nuper vicecomitem, fieri facias de bonis ecclesiasticis, sequestrari facias de bonis ecclesiasticis, and all other writs in aid of a writ of fieri facias or of elegit, may be issued and executed in the same cases and in the same manner as heretofore. R. 2. Writs in aid.

ORDER XLIV.

Order XLIV.

ATTACHMENT.

1. A writ of attachment shall have the same effect as a writ of attachment issued out of the Court of Chancery has heretofore had. R. 1. Effect of attachment.

2. No writ of attachment shall be issued without the leave of the Court or a judge, to be applied for on notice to the party against whom the attachment is to be issued. R. 2. Leave to issue attachment.

An attachment is a writ directed to the sheriff, commanding him to attach the person against whom it is issued, and have him before the Court to answer his contempt. The writ must be returned by the sheriff, like other writs of execution. The practice in Chancery was formerly governed by the Chancery General Order of 7th Jan., 1870. See 1 Dan. Ch. Pr., pp. 907, *et seq.*, ed. 5; and see now Seton, 4 ed. p. 1563, *et seq.*

The second of the above rules introduced an important change in the Chancery Division: inasmuch as a writ can never, for the future, issue as of right without an order, granted after notice to the party: *Abud* v. *Riches*, 2 Ch. D. 528, M. R. This was already the rule in the Common Law Courts, except in the case of an attachment against a sheriff for disobeying an order to return a writ: in which case the rule was made absolute ex parte; see R. G., H. T. 1853, Rule 168. That exception is now abolished: *Jupp* v. *Cooper*, 5 C. P. D. 26; *Eynde* v. *Gould*, W. N. 1882, p. 74. As to attaching a judgment debtor for disobedience to an order obtained in one of two concurrent proceedings to recover the debt, see *Hayter* v. *Beall*, 44 L. T. 131, C. A.

The provisions of O. LV., r. 1, *post*, p. 405, apply to an application for an attachment. The costs are, therefore, in the discretion of the Court, and are not limited to a fixed amount: *Abud* v. *Riches*, *ubi supra*. Costs should be asked for and disposed of on the application for the attachment: *Ibid.*

Service of notice of motion upon the solicitors on the record of the party to be attached is sufficient service: *Browning* v. *Sabin*, 5 Ch. D. 511, M. R.; *Richards* v. *Kitchen*, 25 W. R. 602, V.-C. B., but see *Mann* v. *Perry*, 44 L. T. 248. So too is service by leaving the notice of motion at the residence of the party to be affected thereby: *Re a Solicitor*, 14 Ch. D. 152, M. R. As to substituted service, see *Tilney* v. *Stansfield*, 28 W. R. 582.

Order XLIV. r. 2.

An interlocutory order under O. LII., *post*, p. 394, may be enforced by attachment: *Hutchinson* v. *Hartmont*, W. N. 1877, p. 29, M. R. But a judgment or order, under that Order or otherwise, if it be for the payment into Court of money, can only be enforced by attachment if the case falls within the exceptions in the Debtors' Act, 1869 (32 & 33 Vict. c. 62): *Ibid.*; *Phosphate Sewage Co.* v. *Hartmont*, 25 W. R. 743, V.-C. M. On the same principle, a person attached for misconduct will not be detained for costs: *Jackson* v. *Mawby*, L. R. 1 Ch. D. 86, V.-C. H. See also *Earl of Lewes* v. *Barnett*, L. R. 6 Ch. D. 252, C. A.

As to attaching a member of Parliament, see *Re Anglo-French Co-operative Society*, 14 Ch. D. 533.

Order XLV.

ORDER XLV.

ATTACHMENT OF DEBTS.

R. 1.

Application for examination of judgment debtor.

1. Where a judgment is for the recovery by or payment to any person of money, the party entitled to enforce it may apply to the Court or a judge for an order that the judgment debtor be orally examined as to whether any and what debts are owing to him, before an officer of the Court, or such other person as the Court or judge shall appoint; and the Court or judge may make an order for the examination of such judgment debtor, and for the production of any books or documents.

The power of enforcing judgments by attaching debts due by third persons to the judgment debtor has existed in the Common Law Courts since 1854. It was given by the C. L. P. Act, 1854; and the procedure has hitherto been governed in part by that Act, and in part by the C. L. P. Act, 1860. The present Order applies the practice of attachment of debts to all divisions of the Court. The several rules are in substance a reproduction of the sections relating to the subject in the C. L. P. Acts of 1854 and 1860; with the exception that s. 28 of the C. L. P. Act, 1860, which enabled a judge to refuse to interfere by attachment where, from the smallness of the amount to be recovered, or of the debt sought to be attached, or otherwise, the remedy sought would be worthless or vexatious, is not repeated.

The above rule is taken from s. 60 of the C. L. P. Act, 1854.

It has been held under that section that there was no power to examine an officer of a Corporation as to debts due by it to a judgment debtor: *Dickson* v. *Neath and Brecon Ry. Co.*, L. R. 4 Ex. 87.

A debtor to be examined is entitled to conduct-money. An attachment was refused for disobedience to an order to come up for examination, without an affidavit showing tender of conduct-money, reason for not examining the debtor at his own residence,

and that there was no other means of ascertaining the debt: *Protector Endowment Co.* v. *Whitlam*, 36 L. T. 467, Q. B. D.

The examination of the debtor is intended to be of a strict and searching character: *Republic of Costa Rica* v. *Strousberg*, 16 Ch. D. 8, C. A. For a form of order for examination of a judgment debtor, see App. H. No. 36, *post*, p. 593.

R. 2. Order attaching debts.

2. The Court or a judge may, upon the ex parte application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his solicitor stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court or a judge or an officer of the Court, as such Court or judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

Order to garnishee to show cause why he should not pay.

This is taken from s. 61 of the C. L. P. Act, 1854.

What the Court or judge is empowered to attach is, *debts* owing or accruing to the judgment debtor. Rent due by a tenant is a debt attachable: *Mitchell* v. *Lee*, L. R. 2 Q. B. 259. So is money in the hands of a sheriff, being the proceeds of an execution levied by him: *Murray* v. *Simpson*, 8 Ir. C. L. App. xlv. So is a debt for which a cheque has been given by the garnishee, if the cheque is dishonoured or stopped: *Cohen* v. *Hale*, 3 Q. B. D. 371. So are moneys in the hands of a receiver appointed in an administration action: *Rapier* v. *Wright*, 14 Ch. D. 638; and so is interest on railway stock guaranteed by one railway company to another under an arrangement confirmed by statute: *Bouch* v. *Sevenoaks Ry.*, 4 Ex. D. 133. Upon a judgment against a company, money in the hands of an official liquidator may be attached: *Ex parte Turner*, 2 D. F. & J. 354. Upon a judgment against an executor, as such, a debt due to the testator's estate may be attached: *Burton* v. *Roberts*, 6 H. & N. 93; *Fowler* v. *Roberts*, 2 Giff. 226. And where such an order of attachment has been made, its enforcement will not be restrained on the ground that a decree for administration has been made after the order; or, it would seem, after the judgment, though before the order: *Ibid.*

After the analogy of a *fi. fa.*, under which the goods of any one of those against whom it is issued may be taken, a debt due to one of several judgment debtors may be attached to satisfy the judgment against all: *Miller* v. *Mynn*, 1 E. & E. 1075.

An order cannot be made to attach a debt due from a firm described in the order by the firm name: *Walker* v. *Rooke*, 6 Q. B. D. 631.

The debt must be an absolute not a conditional debt: *Howell* v. *Metropolitan Railway*, 19 Ch. D. 508.

Unliquidated damages cannot be attached: *Johnson* v. *Diamond*, 11 Ex. 73; even though their amount has been ascertained by the verdict of a jury, but no judgment yet had: *Jones* v. *Thompson*,

Order XLV. rr. 2, 3.

E. B. & E. 63. A notice to treat under the Lands Clauses Act, on which nothing has been done, does not create an attachable debt: *Richardson* v. *Elmit*, L. R. 2 C. P. D. 9. The proceeds of a judgment paid into a county court are not attachable as a debt due from the registrar to the judgment-debtor: *Dolphin* v. *Layton*, 4 C. P. D. 130; and where the judgment debtor is the holder of a promissory note not yet due, the sum represented by the note cannot be attached as a debt due from the promisor: *Pyne* v. *Kinna*, 11 Ir. C. L. R. 40. As to pensions and superannuation allowances, see *Innes* v. *East India Co.*, 17 C. B. 351; *Dent* v. *Dent*, L. R. 1 P. & D. 366; *Ex parte Hawker*, L. R. 7 Ch. 214. As to salary from a local board, see *Hall* v. *Pritchett*, 3 Q. B. D. 215. Before the Judicature Act, ss. 24 and 25, it was held that a debt could only be attached to which the judgment debtor was himself entitled both at law and in equity, and not one which he had assigned: *Hirsch* v. *Coates*, 18 C. B. 757. Since the Judicature Acts, it has been held by Quain, J., at Chambers, that an equitable debt may be attached: *Wilson* v. *Dundas*, W. N. 1875, p. 232. As to obtaining apportionment of, and attaching a judgment debtor's share of interest on a trust fund, see *Nash* v. *Pease*, 47 L. J. Q. B. 766.

By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 233, seamen's wages whether due or accruing cannot be attached. Nor, by 33 & 34 Vict. c. 30, can workmen's wages.

The section in express terms applies to debts accruing, as well as debts actually owing: see *Sparks* v. *Younge*, 8 Ir. C. L. 251; *Tapp* v. *Jones*, L. R. 10 Q. B. 591; *Rapier* v. *Wright*, 14 Ch. D. at p. 643.

Rule 2 authorises a judge to do two things; first, to attach the debt, as to the effect of which see the next rule; secondly, to order its payment to the judgment creditor. This latter power may be exercised by the same order which attaches the debt, or by a subsequent one. It may also be exercised with respect to debts accruing, as well as debts owing. Such debts may be ordered to be paid when they fall due; and it is not necessary to wait and obtain a fresh order for payment of each as it becomes payable: *Tapp* v. *Jones*, *ubi supra*.

For a form of garnishee order under this rule, see App. H. No. 37, *post*, p. 593.

An order dismissing with costs an action for want of prosecution is not a judgment within the meaning of this rule: *Cremetti* v. *Crum*, 4 Q. B. D. 225.

R. 3.

Service of garnishee order. Effect.

3. Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the Court or judge shall direct, shall bind such debts in his hands.

This is taken from s. 62 of the C. L. P. Act, 1854.

The effect of the words "shall *bind* such debts" has often undergone discussion. Under the Bankruptcy Act, 1849, it was held that a judgment creditor who had obtained an order attaching a debt, or an order for payment, was a creditor holding security, but not a creditor having a lien within the meaning of s. 184 of that Act; and that, therefore, if bankruptcy intervened before actual payment, the assignee, not the judgment creditor, was entitled: *Holmes* v. *Tutton*, 5 E. & B. 65; *Turner* v. *Jones*, 1 H. & N. 878; *Tilbury* v. *Brown*, 30 L. J. Q. B. 46. But a payment by the garnishee in obedience to an order to pay, and to avoid an execution, where he either had no notice of adjudication in bankruptcy, or what was the same thing the registration of a deed of arrangement

under the Bankruptcy Act, 1861, or where he had no opportunity of applying to set aside the order, was a good payment as far as he was concerned: *Wood* v. *Dunn*, L. R. 2 Q. B. 73. The enactments of the Bankruptcy Act, 1869, as to the rights of secured creditors, are entirely different from those in force when the above cited cases were decided: *Slater* v. *Pinder*, L. R. 7 Ex. 95; *Ex parte Rocke*, L. R. 6 Ch. 795. And under the present law, a creditor who has obtained a garnishee-order is in the same position as an execution creditor who has seized. He has a charge on the debt, which is good against the trustee in bankruptcy: *Emanuel* v. *Bridger*, L. R. 9 Q. B. 286; *Ex parte Josselyne*, 8 Ch. D. 527, C. A. *Ex parte Greenway*, L. R. 16 Eq. 619, C. J. B., seems to be overruled.

The debts are bound from the date of the order of attachment; and no set-off, and nothing affecting the state of the accounts between the garnishee and the judgment debtor, arising after that date, can be taken into account: *Tapp* v. *Jones*, L. R. 10 Q. B. 591; though it would seem that a set-off existing at that date might avail: *Sampson* v. *Seaton and Beer Ry. Co.*, L. R. 10 Q. B. 28. The garnishee cannot set off a debt due to him by the judgment creditor: *Ibid.*

As to the effect of an attachment upon a solicitor's lien, see *Hough* v. *Edwards*, 1 H. & N. 171; *Eisdell* v. *Coningham*, 28 L. J. Ex. 213; *Sympson* v. *Prothero*, 26 L. J. Ch. 671; *Hamer* v. *Giles*, 11 Ch. D. 942 (order *nisi*).

The order binds the debt in the hands of the garnishee only; and, therefore, if the amount has been paid into the Court of Chancery, it is not bound, and that Court will not interfere to give effect to the order: *Stevens* v. *Phelips*, L. R. 10 Ch. 417.

Where a debt is secured, a garnishee order does not affect the security: *Chatterton* v. *Watney*, 16 Ch. D. 378; 17 Ch. D. 259, C. A.

R. 4. Order for execution against garnishee.

4. If the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the Court or judge may order execution to issue, and it may issue accordingly, without any previous writ or process, to levy the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the judgment debt.

This is taken from s. 63 of the C. L. P. Act, 1854. For a form of order under this rule, see App. H, No. 38, *post*, p. 594.

R. 5. Issue where garnishee disputes liability.

5. If the garnishee disputes his liability, the Court or judge instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined.

This is taken from s. 64 of the C. L. P. Act, 1854.

R. 6. Order for third person to appear.

6. Whenever in proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the

Court or judge may order such third person to appear, and state the nature and particulars of his claim upon such debt.

This is taken from s. 29 of the C. L. P. Act, 1860. As to the proceedings where the money sought to be attached is said to be trust money, see *Roberts* v. *Death*, 8 Q. B. D. 319, C. A.

R. 7. Proceedings as to claim of third person.

7. After hearing the allegations of such third person under such order, and of any other person whom by the same or any subsequent order the Court or judge may order to appear, or in case of such third person not appearing when ordered, the Court or judge may order execution to issue to levy the amount due from such garnishee, or any issue or question to be tried or determined according to the preceding Rules of this Order, and may bar the claim of such third person, or make such other order as such Court or judge shall think fit, upon such terms, in all cases, with respect to the lien or charge (if any) of such third person, and to costs, as the Court or judge shall think just and reasonable.

This is taken from s. 30 of the C. L. P. Act, 1860. An order made by consent under this rule is final: *Eade* v. *Winser*, 47 L. J. Q. B. 584.

R. 8. Discharge of garnishee.

8. Payment made by, or execution levied upon, the garnishee under any such proceedings as aforesaid shall be a valid discharge to him as against the judgment debtor, to the amount paid or levied, although such proceeding may be set aside, or the judgment reversed.

This is taken from s. 65 of the C. L. P. Act, 1854. See *Mayor of London* v. *Joint Stock Bank*, 6 App. Cas. 393 H. L. as to discharge by payment under compulsion of law.

R. 9. Debt attachment book.

9. There shall be kept by the proper officer a debt attachment book, and in such book entries shall be made of the attachment and proceedings thereon, with names, dates, and statements of the amount recovered, and otherwise; and copies of any entries made therein may be taken by any person upon application to the proper officer.

This is taken from s. 66 of the C. L. P. Act, 1854.

R. 10. Costs

10. The costs of any application for an attachment of debts, and of any proceedings arising from, or incidental to such application, shall be in the discretion of the Court or a judge.

This is taken from s. 67 of the C. L. P. Act, 1854.

For the forms in use in the Chancery Division, see Seton on Decrees, pp. 311, *et seq.*, ed. 4.

ORDER XLVI.

Order XLVI.

CHARGING OF STOCK OR SHARES AND DISTRINGAS.

R. 1. Charging order.

1. An order charging stock or shares may be made by any Divisional Court, or by any judge, and the proceedings for obtaining such order shall be such as are directed, and the effect shall be such as is provided by 1 & 2 Vict. c. 110, ss. 14 and 15, and 3 & 4 Vict. c. 82, s. 1.

By 1 & 2 Vict. c. 110, s. 14 :—

Judgment, a charge on public stock and shares in companies, &c., by order of a judge.

"If any person against whom any judgment shall have been entered up in any of Her Majesty's Superior Courts at Westminster shall have any Government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the Superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon; and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor, provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order."

Order of judge to be made in first instance ex parte, and, on notice to the bank or company, to operate as a distringas.

By s. 15 :—"Every order of a judge charging any Government stock, funds, or annuities, or any stock or shares in any public company, under this Act, shall be made, in the first instance, ex parte, and without any notice to the judgment debtor, and shall be an order to show cause only; and such order, if any Government stock, funds, or annuities, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the Governor and Company of the Bank of England from permitting a transfer of such stock in the meantime, and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and that if, after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorized agent of such corporation, and before the same order shall be discharged or made absolute, such corporation, or person or persons, shall permit any such transfer to be made; then, and in such case, the corporation, or person or persons, so permitting such transfer, shall be liable to the judgment creditor for the value or the amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment debtor in the meantime shall be valid or

Order XLVI. r. 1.

effectual as against the judgment creditor; and, further, that unless the judgment debtor shall, within a time to be mentioned in such order, show to a judge of one of the said Superior Courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney, or agent, be made absolute; provided that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit."

Order may be discharged or varied.

By 3 & 4 Vict. c. 82, s. 1, passed to remove doubts as to the construction of the former Act, it is enacted that "The aforesaid provisions of the said Act shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stocks, funds, annuities, or shares as aforesaid, as also in the dividends, interest or annual produce of any such stock, funds, annuities or shares; and whenever any such judgment debtor shall have any estate, right, title, or interest, vested or contingent in possession, remainder, or reversion, in, to, or out of any such stocks, funds, annuities, or shares, as aforesaid, which now are or shall hereafter be standing in the name of the Accountant-General of the Court of Chancery, or the Accountant-General of the Court of Exchequer, or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such judge to make any order as to such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor; provided always, that no order of any judge as to any stock, funds, annuities, or shares standing in the name of the Accountant-General of the Court of Chancery, or the Accountant-General of the Court of Exchequer, or as to the interest, dividends, or annual produce thereof, shall prevent the Governor and Company of the Bank of England, or any public company, from permitting any transfer of such stocks, funds, annuities, or shares, or payment of the interest, dividends, or annual produce thereof, in such manner as the Court of Chancery or the Court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in any such order."

The things which may be charged under these sections are stock or shares which the judgment debtor has standing in his own name in his own right, or in the name of any person in trust for him (under the first Act), and (under the second) the interest of the judgment debtor, whether in possession, remainder, or reversion, vested or contingent, in such stock, funds, annuities, or shares, or in the dividends, interest, or annual produce of them. Such property standing in the name of the Accountant-General of the Court of Chancery in which the judgment debtor had any interest was also expressly included in the second Act. And s. 6 of the Court of Chancery (Funds) Act, 1872 (35 & 36 Vict., c. 44), seems to continue the same right as to property in the hands of the Paymaster-General, who now fills the place of the Accountant-General.

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In *Watts* v. *Porter*, 3 E. & B. 743, the majority of the Court of Queen's Bench held that stock standing in the name of trustees for the judgment debtor, but which he had mortgaged, though no notice of the mortgage had been given to the trustees, might be charged, so as to give the judgment creditor priority over the mortgagee. But this view was disapproved in *Bearan* v. *Lord Oxford*, 6 D. M. & G. 507; and see *Kinderley* v. *Jervis*, 22 Beav. 1. If, notwithstanding the assignment, the judgment debtor still retains an equitable interest, that interest at least may be charged; *Baker* v. *Tynte*, 2 E. & E. 897; *Cragg* v. *Taylor*, L. R. 2 Ex. 131. But where a testatrix left her whole estate and effects to trustees, in trust to pay debts and legacies, with a direction to pay the legacies as soon as her means could be converted into cash, and as to the residue in trust for the judgment debtor and others, it was held that the judgment debtor, though interested in the proceeds of the estate, was not interested in stock and shares of which the estate in part consisted, so as to make them chargeable: *Dixon* v. *Wrench*, L. R. 4 Ex. 154. In *Fuller* v. *Earle*, 7 Ex. 796, and *Cragg* v. *Taylor*, L. R. 1 Ex. 148, it was held that in Courts of Law it was no answer to an application to charge shares of which the judgment debtor was the registered holder, to show that he held them subject to trusts. But those cases only decided that a Court of Law would make the charge, leaving a Court of Equity to give to it its proper effect, and determine all questions of priority. See also *Rogers* v. *Holloway*, 5 Man. & G. 292. For the future, every Court must recognise equitable rights incidentally appearing: s. 24, sub-s. 4, of the Act of 1873, *ante*, p. 21. Whether this change may affect the granting of an order in such cases may give rise to a question.

Formerly the application, if in aid of a Common Law judgment, could only be made to a Common Law Judge; a Judge in Chancery had no jurisdiction: *Miles* v. *Presland*, 4 M. & Cr. 431. The above rule is express that the application may be to any judge: see *Hopewell* v. *Barnes*, 1 Ch. D. 630, V. C. M.; and the order nisi in that case, *sub nom. Re Prince, Hopewell* v. *Barnes*, Seton on Decrees, p. 305, No. 3, ed. 4. Compare, however, s. 11, sub-s. 1, of the Act of 1875, *ante*, p. 104.

A charging order, when made absolute, operates as from the date of the order nisi, and binds the stock charged as from that date; *Haly* v. *Barry*, L. R. 3 Ch. 452. Where an order had been made charging stock, and it appeared that the judgment debtor was dead when the order *nisi* was made, the Court discharged the order: *Finney* v. *Hinde*, 4 Q. B. D. 102. A charging order upon dividends of stock standing in the books of the Bank of England in the names of legal owners in trust for the judgment debtor does not throw any duty upon the Bank as to the distribution of the fund; it is bound simply to pay to the legal owners: *Churchill* v. *Bank of England*, 11 M. & W. 323. As to a trust for the judgment debtor and others, see *South Western Loan Co.* v. *Robertson*, 8 Q. B. D. 17.

A charging order cannot be made when the sum due is unascertained, nor for costs before taxation: *Widgery* v. *Tepper*, 6 Ch. D. 364, C. A.; overruling *Burns* v. *Irving*, 3 Ch. D. 291, V.-C. H. See *Bagnall* v. *Carlton*, 6 Ch. D. 130, V.-C. B.

For the practice in Chancery as to charging orders on stock and shares, and stop orders in aid, before the Judicature Acts, see Dan. Chan. Pr., pp. 898, *et seq.*, 1543, ed. 5; and for the present practice and forms of orders, see Seton, pp. 305, *et seq.*, ed. 4; *Stanley* v. *Stanley*, 7 Ch. D. 589; and for forms of orders see App. H., forms

Order XLVI. r. 1—5.

Nos. 25, 26, *post*, p. 587. By O. XXXV., r. 3a, proceedings relating to charging orders *nisi* may be taken in the district registry.

As to charging orders under the Solicitors Act (23 & 24 Vict. c. 127), s. 28, see *Owen* v. *Henshaw*, 7 Ch. D. 385; *Higgs* v. *Schrader*, 3 C. P. D. 252. The application to charge the property recovered or possessed must be made to the judge who tried the action, and for a form see App. H., No. 27, *post*, p. 588.

R. 2. *Distringas.*

2. *Any person claiming to be interested in any stock transferable at the Bank of England standing in the name of any other person may sue out a writ of distringas pursuant to the statute* 5 *Vict. c.* 8, *as heretofore. Such writ to be issued out of any office of the High Court in London, where writs of summons are issued.*

This rule is repealed by the rules of April, 1880, and rules 2a to 7 of this order are substituted for it. The repealed rule allowed a distringas to be obtained only against the Bank of England. The new rules contain no such restriction.

R. 2a. Writ of Distringas not to issue. (R. S. C., April, 1880, r. 21.)

2a. Order XLVI. Rule 2, is hereby annulled, and no writ of distringas shall hereafter be issued under the Act 5 Vict. c. 5, s. 5.

R. 3. Meaning of "Company" and "stock." (R. S. C., April, 1880, r. 22.)

3. In the following Rules of this order the expression "Company" includes the Governor and Company of the Bank of England and any other public company, whether incorporated or not, to which 5 Vict. c. 5, s. 5 applies, and the expression "stock" includes shares, securities, and money.

R. 4. Filing and service of affidavit and notice as to stock.

4. Any person claiming to be interested in any stock standing in the books of a company may, on making an affidavit in or to the effect of the form B. 28 in the schedule hereto, and on filing the same in the Central Office with a notice in or to the effect of the form B. 23 in the same schedule annexed thereto, and on procuring an office copy of the affidavit and a duplicate of the filed notice authenticated by the seal of the Central Office, serve the office copy and duplicate notice on the company.

R. 5. Affidavit to state address of claimant.

5. There shall be appended to the affidavit a note stating the person on whose behalf it is filed, and to what address notices (if any) for that person are to be sent. All such notices shall be deemed to have been duly sent if sent through the post by a prepaid letter directed to that person at the address so stated or at any such substituted address as hereinafter mentioned, whether the person to whom the notice is sent is living or not.

R. 6. Alteration of address.

6. The address so stated may, from time to time, be altered by the person by or on whose behalf the affidavit is filed, but all notices sent by post before the alteration to the address originally given or for the time being substituted therefor shall not be affected by any subsequent alteration. Any such alteration of address may be made by service of a memorandum thereof on the Company in the manner required for service of a notice under this order.

R. 7. Service of affidavit and filed notice to have same effect as writ of distringas.

7. The service of the office copy of the affidavit and of the duplicate of the filed notice shall for the period of five years from the day of service, but not longer, (unless the notice is renewed as after mentioned), have the same force and effect as if these Rules had not been made and a writ of distringas in respect of the stock had been duly issued under the Act 5 Vict. c. 5, s. 5.

R. 8. Renewal of notice.

8. The original notice may be kept on foot from time to time by a notice of renewal signed by the person by whom or on whose behalf the original notice was given, and served on the Company, provided the notice of renewal, if only one is given, is served before the expiration of five years from the day on which the original notice was served, or, if more than one is given, then before the expiration of five years from the day on which the last previous notice of renewal was served. Each such notice of renewal shall have the effect of continuing and keeping on foot the original notice for the period of five years from the day on which the first notice of renewal or the last previous notice of renewal (as the case may be) was served.

R. 9. Withdrawal or discharge of notice.

9. A notice filed under this Order may at any time be withdrawn by the person by whom or on whose behalf it was given on a written request signed by him, or its operation may be made to cease by an order to be obtained by motion on notice or by petition duly served by any other person claiming to be interested in the stock sought to be affected by the notice.

R. 10. Effect of request for transfer of stock or payment of dividend.

10. If, whilst a notice filed under this Order continues in force, the Company on whom it is served receive from the person in whose name the stock specified in the notice is standing, or from some person acting on his behalf or representing him, a request to permit the stock to be transferred or to pay the dividends thereon, the Company

Order XLVI. rr. 10, 11.

shall not by force or in consequence of the service or of any renewal of the notice, be authorised, without the order of the Court, to refuse to permit the transfer to be made or to withhold the payment of the dividends for more than eight days after the date of the request.

R. 11. Amendment of description of stock.

11. If the person who files a notice under this Order desires to correct the description of the stock referred to in the filed notice he may file an amended notice and serve on the Company a duplicate thereof sealed with the seal of the Central Office, and in that case the service of the notice shall be deemed to have been made on the day on which the amended duplicate is so served.

The rules as to distringas occur amongst rules relating to execution. But the process of distringas is in no sense of the nature of execution. It is simply a process by which any person claiming stock or shares may restrain the Bank of England or other company from parting with the stock or shares, or any dividend upon them. The practical effect of a distringas is to secure that the property is not dealt with without notice to the person putting on the distringas. The writ was originally issued out of the Equity side of the Exchequer. But when the equity jurisdiction of that Court was taken away by 5 Vict. c. 5, being the Act intended no doubt to be referred to in the above rule, as c. 8, the Act transferred the power of issuing it to the Court of Chancery. The practice is governed by the Act, and by Chan. Cons. Ord. XXVII. See Morgan's Acts and Orders, p. 508, ed. 4; p. 586, ed. 5; Dan. Chan. Pr., 1540, ed. 5. The present rules allow a distringas to be obtained in any division.

Order XLVII.

ORDER XLVII.

Writ of Sequestration and Subpœna.

R. 1. In what cases.

1. Where any person is by any judgment directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment shall at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person. Such writ of sequestration shall have the same effect as a writ of sequestration in Chancery has heretofore had, and the proceeds of such sequestration may be dealt with in the

Effect.

same manner as the proceeds of writs of sequestration have heretofore been dealt with by the Court of Chancery. **Order XLVII. rr. 1, 2.**

This is taken from Chan. Cons. Ord. XXIX., Rule 3; Morgan's Acts and Orders, p. 513, ed. 4.

A writ of sequestration is a writ directed to commissioners requiring them to take possession of all the property real and personal of the person against whom it is issued. Originally it was a mere process of contempt analogous to attachment for compelling obedience to the orders of the Court. But, upon final process, it has long been the practice to apply the proceeds of the sequestration in satisfaction of the liability in respect of which it issues.

For the practice in Chancery before the Judicature Acts, see Dan. Chan. Pr., pp. 912, *et seq.*, ed. 5.

Sequestration is the appropriate remedy where the members of a corporation aggregate are guilty of disobedience to an order; see for instance *Att. Gen.* v. *Walthamstow Local Board*, W. N., 1878, p. 90, M. R. It is doubtful whether a writ of sequestration is available to enforce a simple judgment for a debt: *Ex p. Nelson*, 14 Ch. D. 41 C. A. Sequestration to enforce an order for payment of money into Court now issues without leave: *Sprunt* v. *Pugh*, 7 Ch. D. 567, M. R. As to the form of a writ of sequestration to sequestrate the pension of a County Court judge, see *Wilcock* v. *Terrell*, 3 Ex. D. 323, at p. 329, C. A. See too *Sansom* v. *Sansom*, 4 P. D. 69, as to sequestration in a divorce suit.

As to the practice with regard to this writ, see Seton 4 ed., p. 1574, *et seq.* Notice of a judgment or order must be served before it can be enforced by sequestration.

2. No subpœna for the payment of costs, and, unless by leave of the Court or a judge, no sequestration to enforce such payment, shall be issued. **R. 2.** No subpœna or, without leave, sequestration for costs. (R. S. C., April, 1880, r. 31.)

For an instance of leave, see *Snow* v. *Bolton*, 17 Ch. D. 433, Fry, J. An application under this rule should be made in Chambers, *ibid.*

ORDER XLVIII. **Order XLVIII.**

WRIT OF POSSESSION.

1. A judgment that a party do recover possession of any land may be enforced by writ of possession in manner heretofore used in actions of ejectment in the Superior Courts of Common Law. **R. 1.** On a judgment for land.

For the form of this writ see No. 7, in Appendix F., *post*, p. 565.

By s. 187 of the C. L. P. Act, 1852—Upon any judgment in ejectment for recovery of possession and costs, there may be

Order XLVIII. rr. 1, 2.

either one writ or separate writs of execution for the recovery of possession and for the costs at the election of the claimant.

The writ of possession would only issue into the county where the property recovered was situated. The fi. fa. for costs may issue into any county. See Day, 4 ed., p. 191.

This writ supersedes the old Chancery writ of assistance: *Hall* v. *Hall*, 47 L. J. Ch. 680.

R. 2. Affidavit in support.

2. Where by any judgment any person therein named is directed to deliver up possession of any lands to some other person, the person prosecuting such judgment shall, without any order for that purpose, be entitled to sue out a writ of possession on filing an affidavit showing due service of such judgment and that the same has not been obeyed.

Order XLIX.

ORDER XLIX.

WRIT OF DELIVERY.

In what cases.

A writ for delivery of any property other than land or money may be issued and enforced in the manner heretofore in use in actions of detinue in the Superior Courts of Common Law.

This writ was given by s. 78 of the C. L. P. Act. 1854, which is as follows:—

"The Court or a judge shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed, and that if the said chattel cannot be found, and unless the Court or a judge should otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick, till the defendant render such chattel, or, at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interest in such action."

For the practice at law in actions of detinue before the Judicature Acts, see Chitty's Archbold, pp. 710, *et seq.*, ed. 12; Chitty's Forms, pp. 323, *et seq.*, ed. 10.

For the present form of this writ see No. 8 in Appendix F., *post*, p. 565.

As to a writ of delivery on judgment by default, see note to O. XIII., r. 6, *ante*, p. 218.

ORDER L.

Order L.

CHANGE OF PARTIES BY DEATH, &C.

R. 1. Effect of death, marriage, or bankruptcy. Devolution of estate.

1. An action shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title pendente lite.

By s. 100 of the Act of 1873 "action shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court; and shall not include a criminal proceeding by the Crown. It has, however, been held that the order applies to petitions: *Re Atkins Estate*, 1 Ch. D. 82, V.-C. H.; but a charging order is not within this rule: *Finney* v. *Hinde*, 4 Q. B. D. 102.

Both in the Common Law Courts and in the Court of Chancery the old and inconvenient methods of making good a suit which has become defective by reason of death or otherwise were long since superseded by simple, inexpensive methods of procedure. But the procedure was different in the several courts.

In the Common Law Courts, the practice was governed by ss. 135 to 142 of the C. L. P. Act, 1852, and s. 92 of the C. L. P. Act, 1854. Under those enactments, the procedure varied slightly according to the nature of the defect which had occurred, and the stage at which it occurred. In the case of death, the plaintiff was empowered to enter a suggestion of the death, and proceed with the action in the name of or against the proper parties. And the truth of that suggestion might have been traversed and tried. If the plaintiff omitted to enter the necessary suggestion, the defendant might by summons require him to do so, and in default might do so himself.

In Chancery, the matter was governed by s. 52 of 15 & 16 Vict. c. 86, and Chan. Cons. Ord. XXXII. See notes thereto in Morgan's Acts and Orders, pp. 210, 526, ed. 4; and see Dan. Ch. Pr., pp. 1377, *et seq.*, ed. 5.

The present Order adopts in substance the Chancery procedure.

There is nothing in the above rule to alter the existing law as to what causes of action do and what do not survive: see *e. g. Kirk* v. *Todd*, 30 W. R. 436.

An action for tort survives where the tort injuriously affects the plaintiff's personal estate: *Twycross* v. *Grant*, 4 C. P. D. 40, C. A. As to the death of a sole defendant, an executor, against whom a decree had been made in a creditor's administration action, see *Cash* v. *Parker*, 12 Ch. D. 293. If the defendant in an action for tort dies, and his estate has profited by the tort, the action survives: *Ashley* v. *Taylor*, 10 Ch. D. 768; an executor who continues under this order an action instituted by his testator is personally liable for costs. *Boynton* v. *Boynton*, 4 App. Cas. 733.

Where a female plaintiff married pendente lite, the action was allowed to be carried on in the name of her next friend against her husband: *Darcy* v. *Whitaker*, 24 W. R. 244.

There is nothing to preserve to any person a right of action which by the ordinary rules of law has passed from him. Thus,

Order L. r. 1.

on the bankruptcy of a plaintiff, where the right of action is one which passes to the trustee, the action cannot be carried on by the bankrupt, but only by the trustee: *Jackson* v. *North-Eastern Ry. Co.*, 5 Ch. D. 844, C. A. If, in such a case, there are two trustees, and one refuses to go on, the other may do so, and make his co-trustee a defendant: *Ibid.*

On the bankruptcy of plaintiff, the defendant, wishing to have the action dismissed for want of prosecution, was required to give notice to the trustee: *Wright* v. *Swindon Ry. Co.*, 4 Ch. D. 164, M. R. Where a sole plaintiff died insolvent and intestate, the court appointed a person to represent the estate of the deceased in order to enable the defendant to move to dismiss the action for non-prosecution: *Wingrove* v. *Thompson*, 11 Ch. D. 419. Where in an action for specific performance the plaintiff filed a petition for liquidation, and a trustee was appointed and no one appeared at the trial, Fry, J., ruled that the action had abated and ordered it to be struck out: *Eldridge* v. *Burgess*, 7 Ch. D. 411; and in *Barter* v. *Dubeux & Co.*, 7 Q. B. D. 413, 50 L. J. Q. B. 527, C. A., where the defendant in an action on a bill of exchange became bankrupt, the Court refused to allow the action to be continued against the trustee, holding that it was a case for proof.

As to the assignment of the plaintiff's interest pendente lite, see *Seear* v. *Lawson*, 16 Ch. D. 121, C. A. As to the assignment of the defendant's interest, see *Kino* v. *Rudkin*, 6 Ch. D. 160; *Campbell* v. *Holyland*, 7 Ch. D. 166.

The Order applies only to devolutions or assignments pendente lite: *Att.-Gen.* v. *Birmingham Corporation*, 15 Ch. D. 423, C. A.; but in the case of a foreclosure action, when a party has assigned his interest after decree, the assignee may be made a party, for a foreclosure order is never really absolute: *Campbell* v. *Holyland*, 7 Ch. D. 166, at p. 169, M. R.

When the cause of action survives and a sole defendant dies, if the plaintiff does not make his executor a defendant, the executor may apply for an order that the plaintiff should prosecute the action within a time limited or that in default the action should be dismissed: *Motion* v. *King*, 29 W. R. 73.

An order to add parties under the rules of this Order is an order of course; application in Court is not necessary: *Crane* v. *Loftus*, 24 W. R. 93, V.-C. H.; *Roffey* v. *Miller*, *Ibid.*, 109, M. R.; *Darcy* v. *Whitaker*, 24 W. R. 244. As to costs where the hearing is adjourned to add parties, see *Lydell* v. *Martinson*, 5 Ch. D. 780.

As to the case of consolidated actions, see *Re Wortley*, 4 Ch. D. 180, M. R.

Where, after judgment, it is merely desired te issue execution, and rights or liabilities have become changed by death or otherwise, the person seeking to issue execution may proceed under O. XLII.. r. 19, *ante*, p. 368.

Cause of action not surviving.

The Order applies only to cases when the cause of action survives or continues; but there were certain cases under the old practice where, although the cause of action did not survive, the proceedings having got to a certain stage were allowed to go on to final judgment; and presumably in such cases the old practice would still be followed. By s. 139 of the C. L. P. Act, 1852, the death of either party between verdict and judgment is not to be alleged for error, provided judgment be entered within two terms after verdict, and this section has been held to apply to actions where the cause of action does not survive: *Kramer* v. *Waymark*, 1

L. R. Ex. 241. See the notes thereon in Day's C. L. P. Act, 4 ed. pp. 156, 157. At common law, if a party died after an action had been referred for the statement of a special case, or while the Court was considering judgment, or in any other case where the delay was the act of the Court and not of the parties, the practice was to enter judgment *nunc pro tunc*, for the common law rule is *actus curiæ neminem gravabit*. It may be somewhat doubtful whether under the terms of O. XLI. r. 2, the Court has power now to enter judgment *nunc pro tunc*. The power was expressly preserved by R. G. T. T. 1853, r. 32. Under s. 140 of the C. L. P. Act, 1852, in cases where the cause of action did not survive, if the plaintiff died after interlocutory and before final judgment the action abated. **Order L. rr. 1—4.**

As to the personal liability for costs of an executor who carries on an action or appeal commenced by the testator, see *Boynton* v. *Boynton*, 4 App. Cas. 733, H. L. Liability for costs.

2. In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to an action, the Court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved in the action, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party be made a party to the action, or be served with notice thereof in such manner and form as hereinafter prescribed, and on such terms as the Court or judge shall think just, and shall make such order for the disposal of the action as may be just. **R. 2.** Power to add parties.

See note to r. 1, *supra*.

3. In case of an assignment, creation, or devolution of any estate or title pendente lite, the action may be continued by or against the person to or upon whom such estate or title has come or devolved. **R. 3.** Continuance by or against new parties

See note to r. 1, *supra*.

4. Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of an action, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the action, it becomes necessary or desirable that any person not already a party to the action should be made a party thereto, or that any person already a party thereto should be made a party thereto in another capacity, an order that the proceedings in the action shall be carried on between the continuing parties to the action, and such new party or parties, may be obtained ex parte on application to the Court or a judge, upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence. **R. 4.** Order for new parties. Or in new capacity. Application ex parte.

See note to r. 1, *supra*.

As to the birth of a child pendente lite, who is interested in the subject matter of the suit, see *Haldane* v. *Eckford*, W. N. 1879, p. 80. Where an appellant dies, application to revive should be made to the court of first instance: *Ransom* v. *Patten*, 17 Ch. D. 767, C. A., see the form of order given there.

R. 5. Service of order.

5. An order so obtained shall, unless the Court or judge shall otherwise direct, be served upon the continuing party or parties to the action, or their solicitors, and also upon each such new party, unless the person making the application be himself the only new party, and the order shall from the time of such service, subject nevertheless to the next two following Rules, be binding on the persons served therewith, and every person served therewith who is not already a party to the action shall be bound to enter an appearance thereto within the same time and in the same manner as if he had been served with a writ of summons.

Effect.

R. 6. Application to discharge order.

6. Where any person who is under no disability or under no disability other than coverture, or being under any disability other than coverture, but having a guardian ad litem in the action, shall be served with such order, such person may apply to the Court or a judge to discharge or vary such order at any time within twelve days from the service thereof.

Time.

R. 7. In case of disability.

7. Where any person being under any disability other than coverture, and not having had a guardian ad litem appointed in the action, is served with any such order, such person may apply to the Court or a judge to discharge or vary such order at any time within twelve days from the appointment of a guardian or guardians ad litem for such party, and until such period of twelve days shall have expired such order shall have no force or effect as against such last-mentioned person.

Time.

Order LI.

ORDER LI.

Transfers and Consolidation.

R. 1. Transfer by order of

1. Any action or actions may be transferred from one Division to another of the High Court or from one judge to another of the Chancery Division by an order of the

choose division.

High Court to which, according to the Rules of Court or the provision of the principal Act or this Act, the same ought not to be assigned, the Court, or any judge of such Division, upon being informed thereof, may on a summary application at any stage of the cause or matter, direct the same to be transferred to the Division of the said court to which, according to such rules or provisions, the same ought to have been assigned, or he may, if he think it expedient so to do, retain the same in the Division in which the same was commenced; and all steps and proceedings whatsoever taken by the plaintiff or petitioner, or by any other party in any such cause or matter, and all orders made therein by the Court or any judge thereof before any such transfer, shall be valid and effectual to all intents and purposes in the same manner as if the same respectively had been taken and made in the proper Division of the said Court to which such cause or matter ought to have been assigned.]

By the Act of 1873:—

Power of transfer.

[S. 36. Any cause or matter may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by such authority and in such manner as Rules of Court may direct, from one Division or judge of the High Court of Justice to any other Division or judge thereof, or may by the like authority be retained in the Division in which the same was commenced, although such may not be the proper Division to which the same cause or matter ought, in the first instance, to have been assigned.]

R. 1a.

Transfer of Chancery action for trial only. (R. S. C., June, 1877.)

1a. In the Chancery Division a transfer of a cause from one judge to another may by the same or a separate order be ordered to be made or to be deemed to have been made for the purpose only of trial or of hearing, and in such case the original and any further hearing shall take place before the judge to whom the cause shall be so transferred; but all other proceedings therein, whether before or after the hearing or trial of the cause, shall be taken and prosecuted in the same manner as if such cause had not been transferred from the judge to whom it was assigned at the time of transfer, and as if such judge had made the decree or judgment, if any, made therein, unless the judge to whom the cause is transferred shall direct

that any further proceedings therein, before or after the hearing or trial thereof, shall be taken and prosecuted before himself or before an official or special referee.

By the same group of rules in which this rule is contained, R. S. C., June, 1877:—Subject to the power of transfer, and subject also to the power of the Lord Chancellor by order from time to time otherwise to direct, every cause or matter which shall be commenced in the Chancery Division of the High Court shall be assigned to one of the judges thereof by marking the same with the name of such of the same judges as the plaintiff or petitioner may in his option think fit. (See O. V., r. 4a, *ante*, p. 194.)

An application to stay proceedings may properly be made to the judge to whom an action was originally assigned, and not to the judge to whom it has been transferred for trial: *Robinson* v. *Chadwick*, 26 W. R. 421. As to interlocutory applications, see *Lloyd* v. *Jones*, 7 Ch. D. 390.

An application to the Court respecting the misconduct of a solicitor in an action is a "further proceeding" in the action within the meaning of this rule: *Cave* v. *Cave*, 49 L. J. Ch. 656. So is an application to enforce a solicitor's lien for costs: *Porter* v. *West*, 50 L. J., Ch. 231.

See further s. 12 of the Act of 1881, *ante*, p. 166, which gives power to one judge to act for another in interlocutory matters in cases of urgency.

See *Davis* v. *Davis*, 48 L. J. Ch. 40, as to two actions in the courts of different judges of the Chancery Division relating to the same estate.

R. 2. Transfer by order on consent of President of Division.

2. Any action may, at any stage, be transferred from one Division to another by an order made by the Court or any judge of the Division to which the action is assigned: Provided that no such transfer shall be made without the consent of the President of the Division to which the action is proposed to be transferred.

This rule only applies to transfers from Division to Division, not from judge to judge: *Chapman* v. *Real Property Trust*, 7 Ch. D. 732.

Notwithstanding the words in this rule "the Court or any judge *of the Division to which the action is assigned*," a judge of any Division sitting at chambers for the business of the Queen's Bench Division, has power to make an order for transfer: *Hillman* v. *Mayhew*, 1 Ex. D. 132.

It is doubtful whether the Court of Appeal can order the transfer of an action from one Division to another without the consent of the President: *Storey* v. *Waddle*, 4 Q. B. D. 289, C. A.

Where a defendant, by way of counterclaim, seeks relief to which the Chancery Division alone has the requisite machinery to give due effect (such as specific performance), this may be a good reason for transferring the action to that division: *Holloway* v. *York*, 2 Ex. D. 333, C. A.; *Hillman* v. *Mayhew*, *ubi supra*; *Holmes* v. *Hervey*, 25 W. R. 80, Ex. D. An order of transfer is a discretionary order: *The Fulica*, W. N. 1880, p. 172. In an action for trespass where there was a counter-claim for specific performance of an agreement and rectification of a deed, transfer to the Chancery Division was refused: *Storey* v. *Waddle*, 4 Q. B. D. 289: see too

Order LI. r. 2.

Standard Discount Co. v. *Barton*, 37 L. T. 581, where the defendant instituted a cross-action in the Chancery Division. In *Hawkins* v. *Morgan*, 49 L. J. Q. B. 618, an action for personal injury resulting from a collision between ships was transferred to the Probate and Admiralty Division, where a limitation action relating to the collision was pending. In *Cunnot* v. *Morgan*, 1 Ch. D. 1, C. A., the Court refused to transfer an action for damages for misrepresentation from the Chancery to the Queen's Bench Division. In a case which appeared to be an ordinary suit for salvage, Jessel, M. R., transferred the action to the Probate, Divorce and Admiralty Division: *Humphreys* v. *Edwards*, 45 L. J. Ch. 112. M. R. But any Division may give effect to facts as an equitable defence to an action, though the substantive relief to which those facts entitle the defendant be such as belongs properly to the Chancery Division. Thus, in an action on a deed, the Common Pleas Division admitted, as a defence to the action, facts which showed a right to have the deed rectified, although the rectification of deeds belongs to the Chancery Division: *Mostyn* v. *West Mostyn Co.*, 1 C. P. D. 145; see *Clements* v. *Norris*, W. N. 1878, p. 4, V.-C. H.

An application to transfer should be on notice, not ex parte: *Humphreys* v. *Edwards*, *ubi supra*. An order under this rule does not take effect until the consent has been obtained of the president of the Division to which the transfer is made: *Ibid.*

R. 2a.

Transfer of action after winding up or administration, order.

(R. S. C., June, 1876, r. 18.)

2a. When an order has been made by any judge of the Chancery Division for the winding up of any company under the Companies Acts, 1862 and 1869, or for the administration of the assets of any testator or intestate, the judge in whose Court such winding up or administration shall be pending shall have power, without any further consent, to order the transfer to such judge of any action pending in any other Division brought or continued by or against such company, or by or against the executors or administrators of the testator or intestate whose assets are being so administered, as the case may be.

The Acts intended to be referred to by this rule are the Companies Acts, 1862 and 1867, there being no such Act of the year 1869.

This rule only applies to cases where a winding up or administration order has actually been made. It is now well settled that before that time application must be made to the Division in which the action is pending: *Re Artistic Colour Printing Co.*, 14 Ch. D. 502; see too the cases cited in the note to s. 24, sub-s. 5 of the Act of 1873, *ante*, p. 23. The application may be *ex parte*: *Musbach* v. *Anderson*, 26 W. R. 100.

The rule does not apply to an action pending before another judge of the Chancery Division: *Re Madras Irrigation Co.*, 16 Ch. D. 702, M. R.; or to a petition: *Re National Funds Assurance Co.*, 25 W. R. 23; or to an action against an executor where he is personally liable: *Chapman* v. *Mason*, 40 L. T. 678; or to an action against a liquidator personally: *Re Thames Steam Ferry Co.*, 40 L. T. 422, Fry, J.

For instances of transfers effected under this rule, see *Re Stubbs*, 8 Ch. D. 154, where an action was transferred from the Exchequer Division after a conditional order for judgment had been made; see too *Re Timms*, 26 W. R. 692.

Application may be made under the rule *ex parte: Field* v. *Field*, W. N. 1877, p. 98; *Re Landore Siemens Steel Co.*, 10 Ch. D. 489. Order LI. r. 2—4.

3. Any action transferred to the Chancery Division or the Probate Division, shall, by the order directing the transfer, be directed to be assigned to one of the judges of such Division to be named in the order. R. 3. Assignment to judge.

4. Actions in any Division or Divisions may be consolidated by order of the Court or a judge in the manner heretofore in use in the Superior Courts of Common Law. R. 4. Consolidation of actions.

The term, consolidation of actions, is used in two senses. First, if a plaintiff brings two actions against the same defendant, for matters which might properly be combined in one action, and the double proceeding is shown to be vexatious, the Court, in the exercise of its ordinary power to prevent any abuse of its own process, will consolidate the actions; that is to say, will stay proceedings absolutely in one action, and require the plaintiff to include the whole of his claims in the other; and this has been done with costs against the plaintiff. See, at law, *Cecil* v. *Briggs*, 2 T. R. 639; *Anon*, 1 Chitty's Rep. 709 (n); *Beardsall* v. *Cheetham*, E. B. & E. 243; 1 Tidd's Practice, p. 614, ed. 9; 2 Chitty's Archbold, pp. 1357, *et seq.*, ed. 12.

But the term consolidation is more frequently used in a different sense. Where actions are brought by the same plaintiff against different defendants, but the questions in dispute in all are substantially the same, the Court will, on the application of the defendants, stay proceedings in all the actions except one until that one action has been determined, upon the terms that the various defendants agree to be bound by the event of the action which proceeds. This practice was first introduced in the King's Bench under Lord Mansfield, in the case of actions against the several underwriters upon policies of insurance. (See 1 Tidd's Practice, p. 614, ed. 9.) But it has since been applied in many other cases; as, in the case of separate guarantees by different instruments of separate parts of a debt: *Sharp* v. *Lethbridge*, 4 M. & G. 37; joint and several obligors of a bond conditioned for the good behaviour of another person: *Anderson* v. *Towgood*, 1 Q. B. 245; principal and sureties on a replevin bond: *Bartlett* v. *Bartlett*, 4 Scott, N. R. 779; the several members liable upon a mutual insurance policy: *Lewis* v. *Barker*, 4 C. B. N. S. 330. So, where a number of actions against different defendants may be reduced to classes, those of each class raising the same questions, the Court may allow one action of each class to proceed, and stay the rest: *Syers* v. *Pickersgill*, 27 L. J. Ex. 5.

The order is made on the application of the defendant, and without the necessity of any consent on the plaintiff's part: *Hollingsworth* v. *Brodrick*, 4 A. & E. 646. It binds the defendants in the actions which are stayed to abide the event of the one which proceeds; but it does not bind the plaintiff to do so; and if the result of the first action is against him, he may proceed with another: *Doyle* v. *Anderson*, 1 A. & E. 635; *Doyle* v. *Douglass*, 4 B. & Ad. 544. A consolidation order may be obtained at any time after service of the writ: *Hollingsworth* v. *Brodrick*, *ubi supra*.

second action to be defended, notwithstanding that the plaintiff has succeeded in the first action. But it will require a very strong case to induce it to do so. Probably a case must be shown at least as strong as would be required to procure a new trial. See *Foster* v. *Alwz*, 3 Bing. N. C. 896.

The order is discretionary, and in the Admiralty Division the practice is not to force consolidation on unwilling parties: *The Jacob Landsturm*, 4 P. D. 191.

In *Smith* v. *Whichcord*, 24 W. R. 900, separate actions between different parties relating to the same subject matter were consolidated upon terms.

As to the consolidation of cross-actions, see *Thompson* v. *South-Eastern Railway*, W. N. 1882, p. 52, C. A.

The whole of the cases upon the consolidation of actions at law, many of which are difficult to reconcile, will be found collected in 2 Chitty's Archbold, p. 1357, ed. 12; 2 Lush's Practice, p. 962, ed. 3, by Dixon. The form of order in general use at law will be found in Chitty's Forms, p. 802, ed. 10.

For cases and orders under the former practice in Chancery, relating to consolidation of actions and stay of proceedings, and under the present Order in the Chancery Division, see Seton on Decrees, pp. 322, *et seq.*, ed. 4. See also Morgan's Acts and Orders, pp. 393, *et seq.*, ed. 4; 445, *et seq.*, ed. 5; Dan. Ch. Pr. pp. 698 *et seq.*, ed. 5.

Test actions.

Although consolidation, properly so called, can only be obtained at the instance of defendants, where several defendants are sued by the same plaintiffs, a somewhat analogous proceeding has been adopted in the converse case, where several plaintiffs had brought their several actions against the same defendant to recover similar relief in reference to the same transactions. Malins, V.-C., at the instance of the plaintiffs, enlarged the time for taking any further steps in all the actions but one, until that one should be tried: *Amos* v. *Chadwick*, 4 Ch. D. 869; and a similar course was followed in *Bennet* v. *Lord Bury*, 5 C. P. D. 339; for the form of order, see p. 340. Where the test action for any reason is not fought out, another of the set of actions will, if necessary, be substituted for it: *Amos* v. *Chadwick*, 9 Ch. D. 459, C. A. In the absence of agreement the plaintiff in the test action has no right to indemnity against costs from the other plaintiffs: *Ibid.*

Order LII.

ORDER LII.

Interlocutory Orders as to Mandamus Injunctions or Interim Preservation of Property, &c.

B. 1.

Where primâ facie right shown under contract, order for preservation of property. Bringing into Court.

1. When by any contract a primâ facie case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the Court or a judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured.

Order LII. r. 1—3.

The several rules of this Order and the sections cited below give very important powers to the Court for preserving the rights of the parties uninjured during the pendency of litigation.

i. By r. 1, when a primâ facie case of liability, *under a contract*, is established, and the party primâ facie liable seeks to be relieved from his liability, an order may be made for payment into Court of, or otherwise securing, the amount of the claim, or for the preservation of the subject-matter. The meaning of the word "established" seems to be (r. 5, *post*), admitted on the pleadings if there are pleadings, or shown to the satisfaction of the Court or judge if there are no pleadings. As to enforcing such orders as those referred to, see O. XLII., rr. 2, 5, and 20, *ante*, pp. 363, 369.

ii. By r. 2, an order may be made for the sale of goods which are perishable, or which for other reasons it is desirable to have sold at once.

iii. In any case (not, as under r. 1, in the case of liability under a contract only), an order may be made for the preservation of the subject-matter of the action, or for inspection of property, or the taking of samples, or making observations or experiments: r. 3.

iv. A mandamus or an injunction may be granted, or a receiver appointed, if it be just or convenient: s. 25, sub-s. 8, of the Act of 1873, *ante*, p. 29, and r. 4, *post*.

v. Where property other than lands is claimed, and the defence to the claim is founded upon an alleged lien, an order may be made for delivering up the property to the claimant on payment into Court of the amount of the alleged lien, with a sum for interest and costs, if the Court or judge think fit.

As to enforcing an order made under this rule by attachment, see O. XLIV., r. 2, *ante*, p. 371.

For forms of orders in use in the Chancery Division under this Order, see Seton on Decrees, pp. 171, *et seq.*, ed. 4.

R. 2. Sale of goods.

2. It shall be lawful for the Court or a judge, on the application of any party to any action, to make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as to the Court or judge may seem desirable, of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once.

The power given by this Rule is new. Compare s. 13 of the C. L. P. Act, 1860. Under this rule the sale of a horse has been ordered: *Bartholomew* v. *Freeman*, 3 C. P. D. 316.

R. 3. Detention of property. Inspection. Entry on land.

3. It shall be lawful for the Court or a judge, upon the application of any party to an action, and upon such terms as may seem just, to make any order for the detention, preservation, or inspection of any property, being the subject of such action, and for all or any of the purposes aforesaid to authorise any person or persons to enter upon or into any land or building in the possession of any party to such action, and for all or any of the

Order LII. r. 3, 4.

purposes aforesaid to authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

Samples. Experiment.

The powers given by this Rule are very much wider than the mere power to allow inspection given by s. 58 of the C. L. P. Act, 1854.

In a Probate suit the Court made an order restraining any person from dealing with shares of a ship forming part of the deceased's estate: *Nicholas* v. *Dracachis*, 1 P. D. 72. In *Hyde* v. *Warden*, 1 Ex. D. 309, the Court of Appeal confirmed an order making the plaintiff receiver and manager of a farm, without security. See also s. 25, sub-s. 8, of the Act of 1873, *ante*, p. 29, and note thereto.

In an action to recover jewellery, the defendant alleged that it belonged to a third party, and had been deposited by him to secure a debt due to the defendant. The Court ordered it to be given up to an officer of the Court: *Velati* v. *Braham*, 46 L. J. C. P. 415.

Under the powers given by this rule to make orders for the preservation of property, Fry, J., granted an interim mandatory injunction to compel the defendant in an action for specific performance of an agreement to take a lease, to continue pumping water out of a mine: *Strelley* v. *Pearson*, 15 Ch. D. 113.

See, by way of analogy, *Polini* v. *Gray*, 12 Ch. D. 438, C. A., as to continuing an injunction to preserve a fund pending an appeal to the House of Lords.

R. 4.

Application for mandamus, injunction, or receiver, under rr. 2 and 3.

4. An application for an order under section 25, sub-section 8, of the Act, or under Rules 2 or 3 of this Order, may be made to the Court or a judge by any party. If the application be by the plaintiff for an order under the said sub-section 8 it may be made either ex parte or with notice, and if for an order under the said Rules 2 or 3 of this Order it may be made after notice to the defendant at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff and at any time after appearance by the party making the application.

By s. 25 of the Act of 1873:—

[Sub-s. 8. A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if

out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable.] Order LII. rr. 4, 6.

As to the effect of this sub-section, and the cases in which a mandamus or injunction is granted, or a receiver appointed, see notes thereto, *ante*, p. 29.

As to indorsing the claim on the writ, see O. II., r. 1, *ante*, p. 183, and note thereto. As to an interim injunction granted "over next motion day or until further order," see *Bolton* v. *London School Board*, 7 Ch. D. 766.

This rule, it will be observed, authorises the making of an order on the application of the plaintiff, either ex parte or with notice. It will not in general be made ex parte; but in a case of emergency it will: *Melnish* v. *Milton*, 24 W. R. 679, P. D.; *Hennessy* v. *Bohmann*, W. N. 1877, p. 14, V.-C. M.

Where notice of motion has been given an interlocutory injunction should not be made *ex parte*, even when from pressure of business the motion cannot be brought on: *Graham* v. *Campbell*, 7 Ch. D. 490, C. A. Where an interlocutory injunction is granted there should always be an undertaking as to damages, *ibid.*, and as regards such undertaking no exception will be made even in favour of the Crown: *Secretary for War* v. *Chubb*, W. N. 1880, p. 128.

By consent a motion for an injunction by an interlocutory order is often treated as the trial of the action: see for instance *Aslatt* v. *Corporation of Southampton*, 16 Ch. D. at p. 150, M. R.

5. An application for an order under Rule 1 may be made by the plaintiff at any time after his right thereto appears from the pleadings; or, if there be no pleadings, is made to appear by affidavit or otherwise to the satisfaction of the Court or a judge. R. 5. Application under r. 1.

6. Where an action is brought to recover, or a defendant in his statement of defence seeks by way of counter-claim to recover specific property other than land, and the party from whom such recovery is sought does not dispute the title of the party seeking to recover the same, but claims to retain the property by virtue of a lien or otherwise as security for any sum of money, the Court or a judge may, at any time after such last-mentioned claim appears from the pleadings, or, if there be no pleadings, by affidavit or otherwise to the satisfaction of such Court or judge, order that the party claiming to recover the property be at liberty to pay into Court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs as such Court or judge may direct, and that upon such payment into Court being made, the property claimed be given up to the party claiming it. R. 6. Where lien claimed, order for possession on payment into Court of sum claimed. Interest. Costs.

The power given by this Rule is new.

Order LII. r. 6a—8.

R. 6a. Sale under will or settlement. (R. S. C. March, 1879, r. 7.)

Whenever the trusts of any Will or Settlement are being administered, and a sale is ordered of any property vested in the trustees of such Will or Settlement upon trust for sale or with power of sale by such trustees, the conduct of such sale shall be given to such trustees, unless the judge shall otherwise direct.

R. 8. Writ of injunction abolished. (R. S. C., April, 1880, r. 32.)

8. No writ of injunction shall be issued. An injunction shall be by a judgment or order, and any such judgment or order shall have the effect which a writ of injunction previously had.

This rule is wrongly numbered, there being no rule 7. As to the time of day for serving notices of judgments or orders, see O. LVII., r. 8, *post*, p. 414. Notice of an injunction may, it seems, be given by telegram: *Ex parte Langley, Re Bishop*, 13 Ch. D. 110, C. A.

Order LIII.

ORDER LIII.

MOTIONS AND OTHER APPLICATIONS.

R. 1. Motion.

1. Where by these Rules any application is authorised to be made to the Court or a judge in an action, such application, if made to a Divisional Court or to a judge in Court, shall be made by motion.

Applications to a Judge at Chambers must, under the next Order, be made by summons.

R. 2. Rule nisi, when granted.

2. No rule or order to show cause shall be granted in any action, except in the cases in which an application for such rule or order is expressly authorised by these Rules.

The ordinary practice in the Common Law Courts, except in the few cases in which a rule was made absolute ex parte, and except where the parties chose to show cause in the first instance, that is on the original motion, was to move for and obtain a rule to show cause; and upon cause being shown the rule was discharged or made absolute. The contrary is now the general rule. Notice having been given, the matter is disposed of upon the original motion.

A motion for a new trial (O. XXXIX., *ante*, p. 349), must still be for a rule to show cause.

This rule, it will be observed, applies only to rules or orders made in actions. In other cases: as, in an application to enforce or set aside an award where the submission has been made a rule of court; *Re Phillips* and *Gill*, 1 Q. B. D. 78; or an application

to assign an administration bond: *Goods of Cartwright*, 1 P. D. 422; the old practice prevails, and the order is to show cause.

A rule calling on the sheriff to pay over to the plaintiff's solicitors money levied under a fi. fa. is a rule granted in an action, and notice of motion for such a rule must be given: *Delmar* v. *Fremantle*, 3 Ex. D. 237.

A notice of motion to set aside an award in an action should state the several objections intended to be insisted on in argument of the rule, as required by R. G. H. T. 1853, r. 169: *Mercier* v. *Pepperell*, 19 Ch. D. 58, Chitty, J.

Notice of motion must be given in the case of an application to remit a referee's report: *Graves* v. *Taylor*, 27 W. R. 412.

R. 3. Motion on notice. Dispensing with notice.

3. Except where by the practice existing at the time of the passing of the said Act any order or rule has heretofore been made ex parte absolute in the first instance, and except where by these Rules it is otherwise provided, and except where the motion is for a rule to show cause only, no motion shall be made without previous notice to the parties affected thereby. But the Court or judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order ex parte upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court or judge may think just; and any party affected by such order may move to set it aside.

An application for a mandamus, or injunction, or the appointment of a receiver, under s. 25, sub-s. 8, of the Act of 1873, *ante*, p. 29, may be made ex parte; but should not, except in a case of emergency: O. LII., r. 4, *ante*, p. 396.

Where the party who has given notice of motion fails to appear, the party served and appearing is entitled to an order for his costs: *Berry* v. *Exchange Trading Co.*, 1 Q. B. D. 77. But if the notice of motion be invalid, as by reason of the notice being too short, or expiring in vacation, the party served, not being bound to appear, is not entitled to costs if he does so: *Daubney* v. *Shuttleworth*, 1 Ex. D. 53. As to the principle on which the costs of an abandoned motion are taxed: see *Harrison* v. *Leutner*, 16 Ch. D. 559. Application for costs of an abandoned motion should perhaps be made on notice: *Yetts* v. *Byles*, 25 W. R. 452; see in Court of Appeal, *Re Oakwell Collieries*, 7 Ch. D. 706.

Where a defendant has not appeared, the filing notice of motion under O. XIX., r. 6, *ante*, p. 195, is service within this rule: *Dymond* v. *Croft*, 3 Ch. D. 512, M. R.; *Morton* v. *Miller*, *ibid.* 516, C. A.

R. 4. Notice of motion.

4. Unless the Court or judge give special leave to the contrary there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion.

This rule is taken from Chan. Cons. Ord. XXXIII., Rule 2; Morgan's Acts and Orders, p. 532, ed. 4; Dan. Ch. Pr., p. 1443, ed. 5.

R. 5. Notice not served on all proper parties.

5. If on the hearing of a motion or other application the Court or judge shall be of opinion that any person to whom notice has not been given ought to have or to have

Order LIII. rr. 5—8.

had such notice, the Court or judge may either dismiss the motion or application, or adjourn the hearing thereof, in order that such notice may be given, upon such terms, if any, as the Court or judge may think fit to impose.

R. 6. Adjournment.

6. The hearing of any motion or application may from time to time be adjourned upon such terms, if any, as the Court or judge shall think fit.

R. 7. Service before appearance.

7. The plaintiff shall, without any special leave, be at liberty to serve any notice of motion or other notice, or any petition or summons upon any defendant, who, having been duly served with a writ of summons to appear in the action, has not appeared within the time limited for that purpose.

This rule is taken from Chan. Cons. Ord. III., Rule 8; Morgan, p. 389; Dan., p. 1412.

R. 8. Service with writ, or before time for appearance.

8. The plaintiff may, by leave of the Court or a judge to be obtained ex parte, serve any notice of motion upon any defendant along with the writ of summons, or at any time after service of the writ of summons and before the time limited for the appearance of such defendant.

Order LIV.

ORDER LIV.

APPLICATIONS AT CHAMBERS.

R. 1. Summons.

1. Every application at chambers authorised by these Rules shall be made in a summary way by summons.

By s. 39 of the Act of 1873, *ante*, p. 51:

[Any judge of the said High Court of Justice may, subject to any Rules of Court, exercise in Court or in Chambers all or any part of the jurisdiction by this Act vested in the said High Court, in all such causes and matters, and in all such proceedings in any causes or matters, as before the passing of this Act might have been heard in Court or in Chambers respectively, by a single judge of any of the Courts whose jurisdiction is hereby transferred to the said High Court, or as may be directed or authorised to be so heard by any Rules of Court to be hereafter made. In all such cases, any

judge sitting in Court shall be deemed to constitute a Court.] Order LIV. rr. 1—2a.

2. In the Queen's Bench, Common Pleas, and Exchequer Divisions a master, and in the Probate, Divorce, and Admiralty Division a registrar, may transact all such business and exercise all such authority and jurisdiction in respect of the same as under the Act [or the Schedule thereto], or these Rules, may be transacted or exercised by a judge at chambers, except in respect of the following proceedings and matters; that is to say,— R. 2. Jurisdiction of masters.

All matters relating to criminal proceedings or to the liberty of the subject:

The removal of actions from one Division or judge to another Division or judge:

The settlement of issues, except by consent:

Discovery, whether of documents or otherwise, and inspection, except by consent:

Appeals from district registrars:

Interpleader other than such matters arising in interpleader as relate to practice only, except by consent:

Prohibitions:

Injunctions and other orders under sub-section 8 of section 25 of the Act, or under Order LII., Rules 1, 2, and 3 respectively:

Awarding of costs, other than the costs of any proceeding before such master:

Reviewing taxation of costs:

Charging orders on stock funds, annuities, or share of dividends or annual produce thereof:

Acknowledgments of married women.

The words within brackets in r. 2 have no application, the schedule to the Act of 1873, there referred to, being repealed; see Act of 1875, s. 33, *ante*, p. 127. This rule is modified by r. 4 of R. S. C., November, 1878, which provides as follows:—

2a. The authority and jurisdiction of the District Registrar or of a Master of the Queen's Bench, Common Pleas, or Exchequer Divisions shall not extend to granting leave for service out of the jurisdiction of a writ of summons or of notice of a writ of summons. R. 2a. Service out of jurisdiction. (R. S. C., June, 1876, r. 19.)

The exception contained in Rule 2 of Order LIV. is hereby repealed so far as regards the proceedings hereinafter mentioned before the Masters of the Queen's Bench, Common Pleas, and Exchequer Divisions, and such Masters may exercise all such authority and jurisdiction as may be exercised by a judge at Chambers in respect of: Jurisdiction of masters. (R. S. C., Nov. 1878, r. 4.)

Order LIV. r. 2a.

Discovery, whether of documents or otherwise, and inspection, except inspection under Order LII., Rule 3 ;

Orders *nisi* for charging stock funds, annuities, or share of dividends, or annual proceeds thereof ;

Interpleader, except where all parties concerned consent to a final determination of the question in dispute without a Jury or Special Case, and except where the sum in dispute is less than £50, and one of the parties desire such a determination. In such cases the question shall be determined by the judge, unless the parties agree to refer it to the Master.

As to granting such leave, see O. XI., *ante*, p. 206.

Jurisdiction at chambers was first given to the Common Law masters under the 30 & 31 Vict. c. 68. That Act enabled the judges, by rules of court, to empower the masters to transact such business and exercise such authority and jurisdiction as a judge at chambers might transact and exercise, and as should be specified by such rules, except in respect of matters relating to the liberty of the subject.

By R. G., M. T. 1867, made under the authority of that Act, the masters were empowered to exercise all the jurisdiction of a judge at chambers, except (unless by consent) in a specified list of matters. The matters so excepted correspond, except in a few points, with the list given in the above rules.

The differences are these. The old list of exceptions included the following matters not mentioned in the new :—

The removal of causes from inferior Courts ;

The referring of causes under the C. L. P. Act, 1854 ;

The rectifying of omissions or mistakes in the register under the Joint Stock Companies Act ;

Staying proceedings after verdicts ;

Leave to sue in formâ pauperis.

The new list of exceptions contains the following matters not in the old :—

The removal of actions from Division to Division, or judge to judge ;

The settlement of issues ;

Appeals from district registrars ;

Orders for the protection of property, analogous to injunctions ;

Leave to serve writs out of the jurisdiction.

Under the old rules all the excepted matters were subject to the general qualification, *except by consent*. Jurisdiction by consent is only provided for under the new rules with respect to the settlement of issues and interpleader.

The following rules of this Order continue the former practice unchanged.

Similar powers to those here given to the masters are given to district registrars by O. XXXV., r. 4, *ante*, p. 314.

No costs of counsel's attendance at Chambers can be allowed without a certificate that the case is fit for counsel : R. S. C. (Costs), *post*, p. 627, r. 14.

As to costs thrown away by default of attendance at Chambers, or by any party not being ready, and as to the costs of attendance in special instances, see *ibid.*, pp. 464, *et seq.*

Order LIV. rr. 3—6.

R. 3. Reference to judge.

3. If any matter appears to the master proper for the decision of a judge the master may refer the same to a judge, and the judge may either dispose of the matter or refer the same back to the master with such directions as he may think fit.

R. 4. Appeal to judge.

4. Any person affected by any order or decision of a master may appeal therefrom to a judge at chambers. Such appeal shall be by summons, within four days after the decision complained of, or such further time as may be allowed by a judge or master.

It is not sufficient to take out the summons within four days. It must be returnable within the four days; *Bell* v. *North Staffordshire Ry.*, 4 Q. B. D. 205. If no judge is sitting within the four days, it is, it seems, sufficient to make the summons returnable on the first day when he will sit; and when the appeal is heard the time can be enlarged: *Gibbons* v. *The London Financial Association*, 4 C. P. D. 263. As to enlarging time after the time limited has expired, where the circumstances of the case justify this being done, see *Burke* v. *Rooney*, 4 C. P. D. 226; *Carter* v. *Stubbs*, 6 Q. B. D. 116, C. A.

R. 5. Stay of proceedings.

5. An appeal from a master's decision shall be no stay of proceedings unless so ordered by a judge or master.

R. 6. Manner and time for appeal in Queen's Bench, Common Pleas, and Exchequer Divisions.

6. *In the Queen's Bench, Common Pleas, and Exchequer Division, every appeal to the Court from any decision at Chambers shall be by motion, and shall be made within eight days after the decision appealed against.*

As to the construction of the repealed rule, see *Crom* v. *Samuels*, 2 C. P. D. 21; *Runtz* v. *Sheffield*, 4 Ex. D. 151, C.A.; *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, H. L.

R. 6. Appeal from chambers to court. (R. S. C., March, 1879, r. 8.)

[1] *Sic.*

Rule 6 is hereby annulled, and the following shall stand in lieu thereof:—

In the Queen's Bench, Common Pleas, and Exchequer Divisions, every appeal to the Court from any decision at Chambers shall be by motion, and shall be made within eight days after the decision appealed against, or, if no Court to which such appeal can be made shall sit within such eight days, then on the first on which any such Court may be sitting after the expiration of such eight days.

As to the practice on motions generally, see the last Order and notes thereto.

By this rule the motion must be made within the eight days; it is not enough that notice of motion be given within that time: *Fox* v. *Wallis*, 2 C. P. D. 45.

If the eighth day is a Sunday, then by O. LVII., r. 3, *post*, p. 412, the motion may be made on Monday: *Taylor* v. *Jones*, 45 L. J. C. P. 110.

Order LIV. rr. 6—11.

In *Stirling* v. *Du Barry*, 5 Q. B. D. 65, C. A., an order was made at Chambers on June 20. On June 24th the defendant gave notice of appeal to a Divisional Court for Saturday the 28th. The Court sat to hear motions on the 26th, and sat on the 28th, but not to hear motions. The motion came on on Monday the 30th, and was held to be out of time.

R. 7.
Procedure in Chambers.
(R. S. C., April, 1880, r. 33.)

7. The following Rules, numbered 8 to 14, both inclusive, shall apply to all applications at Chambers in the Queen's Bench, Common Pleas, and Exchequer Divisions.

By Rule 3 of R. S. C., May, 1880, rules 7 to 14 inclusive of this Order do not apply to proceedings in District Registries, see O. XXXV. r. 16, *ante*, p. 316.

R. 8.
Forms of summons.
(R. S. C., April, 1880.)

8. A summons shall be in the form H. 1 in the schedule hereto, with such variations as circumstances require. It shall be addressed to all the persons on whom it is to be served.

For this form, see *post*, p. 577.

R. 9.
Preparation and issue of summons.
(R. S. C., April, 1880.)

9. A summons shall be prepared by the applicant or his solicitor, and shall be sealed in the Central Office, and when so sealed shall be deemed to be issued. The person obtaining a summons shall leave a copy thereof at the Central Office.

R. 10.
Hours of returns.
(R. S. C., April, 1880.)

10. Unless a judge otherwise specially directs, summonses for time only shall be returnable at 10.30 in the forenoon, and be heard by the Masters in priority to other business. Unless as aforesaid, other summonses shall be returnable at successive hours, commencing at 11 in the forenoon, *and summonses to be attended by counsel shall not be returnable before 2 in the afternoon.* In settling the number of summonses returnable at each hour regard shall be had to the nature of the several applications.

R. 10a.
Hours of return.
(R. S. C., May, 1880, r. 4.)

10a. Order LIV., Rule 10, shall have effect as if the words "and summonses to be attended by counsel shall not be returnable before two in the afternoon" were omitted therefrom.

R. 11.
List of summonses.
(R. S. C., April, 1880.)

11. Each summons, not being a summons for time only, shall, when issued, be entered by the proper officer in a list. The lists of summonses shall distinguish those which a Master has jurisdiction to hear from those which a Master has not jurisdiction to hear, and those which are to be attended by counsel from those which are not to be so attended.

12. The summonses in each list for hearing by a judge or Master shall be called on in their order. If when a summons is called on neither party appears, the summons shall be passed over until the list for the hour has been gone through. The summonses passed over shall then be called on a second time in their order. If neither party appears to a summons so called on it shall be struck out. If one party only appears such order as seems just may, on an affidavit of service, be made ex parte. An affidavit of non-attendance shall not be required or allowed.

R. 12. Hearing of summonses. (R. S. C., April, 1880.)

13. An order shall be in the form H. 2 in the schedule hereto, with such variations as circumstances require. It shall be sealed, and shall be marked with the name of the judge or Master by whom it is made.

R. 13. Form of order. (R. S. C., April, 1880.)

For this form, see *post*, p. 577.

14. Written consents to orders and adjournments shall be filed at the Central Office.

R. 14. Filing consents to orders and adjournments. (R. S. C., April, 1880.)

ORDER LV.

Costs.

1. Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity: Provided, that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shown the judge before whom such action or issue is tried or the Court shall otherwise order.

R. 1. Discretion as to costs. Costs out of estate. Trial by jury.

Under the various statutes affecting costs, the rule in the Common Law Courts was, that costs followed the event, except in the cases in which it was otherwise provided by statute. In Chancery, except in the case referred to in the rule of a trustee or mortgagee, &c., they have been in the discretion of the Court. But the rule acted upon was, that the party failing paid the costs in the absence of special circumstances. See Morgan and Davey on Costs, *passim*; Dan. Ch. Pr., pp. 1238, *et seq.*, ed. 5.

Former practice.

This order applies to all proceedings in the High Court which are not expressly excepted from its operation; see *Ex parte*

Excepted proceedi-

Order LV. r. 1.

Mercers' Co., 10 Ch. D. at 482, per Jessel, M. R. The exceptions are criminal proceedings and proceedings for divorce and other matrimonial causes: see O. LXII., r. 1, *post*, p. 442. By O. LXII., r. 2, this order (O. LV.) is expressly extended to revenue proceedings and to all civil proceedings on the Crown side of the Queen's Bench Division. As to what are deemed civil proceedings for this purpose, see O. LXII., r. 6, and note thereto.

O. LV. is in terms made "subject to the provisions of the Act."

County Courts Act, 1867

The limitation there referred to is contained in s. 67 of the Act of 1873, *ante*, p. 68. That section incorporates by reference s. 5 of the County Courts Act, 1867, which deprives a plaintiff of costs who recovers not more than £20 in an action founded on contract, or £10 in an action founded on tort, unless the judge certifies for costs. Presumably also O. LV. is made subject to the provisions of the other orders which deal expressly with costs. As to costs on discontinuance, see O. XXIII., *ante*, p. 272; on payment into court, O. XXX., r. 4, *ante*, p. 289; on attachment, O. XLV., *ante*, p. 376; on motions, O. LIII. rr. 3, 5, *ante*, p. 399.

Trustee, &c., costs.

The order expressly saves the rules in Equity, with respect to the costs of trustees, mortgagees, &c. The effect of this saving is, first, to keep alive the old rules as to such costs, and, secondly to give an appeal from any order made as to such costs, for such an order is an order as to costs which by law are left to the discretion of the Court within the meaning of s. 49 of the Act of 1873: *Furrow* v. *Austin*, 18 Ch. D. 58, C. A.; *Turner* v. *Hancock*, 30 W. R. 480, C. A.; see too *Re Chennell*, 8 Ch. D. 492, C. A.; *Johnstone* v. *Cox*, 19 Ch. D. 17, C. A.

Applies to High Court only.

The order only applies to the High Court. As to costs in the Court of Appeal, see O. LVIII., r. 5, *post*, p. 424. As to costs in the House of Lords, see *post*, p. 673. As to costs incurred previous to application to the High Court, as, for instance, under the Registration of Trade Marks Act, see *Re Brandreth*, 9 Ch. D. 618, M. R.

Neither an interpleader order: *Wicks* v. *Wood*, 26 W. R. 680; *Hartmont* v. *Forster*, 8 Q. B. D. 82, C. A.; nor sending a case for trial to a County Court under 19 & 20 Vict. c. 108, s. 26, removes the case from the jurisdiction of the High Court over costs: *Farmer* v. *May*, 44 L. T. 148; but after an order of reference to a Master under the C. L. P. Act, 1854, and an award made, the Court has no power to give costs: *Wimshurst* v. *Barrow Shipbuilding Co.*, 2 Q. B. D. 335.

Prior enactments as to costs.

The effect of this order is to supersede and impliedly repeal all prior enactments, except the County Courts Act, 1867, which lay down any special rule as to costs instead of leaving them to the discretion of the Court. For instance it supersedes the 21 Jac. 1, c. 16, s. 6, as to costs in slander where less than 40s. is recovered: *Garnett* v. *Bradley*, 3 App. Cas. 544 H. L.; and s. 3 of the County Courts (Admiralty) Act, 1868: *Tenant* v. *Ellis*, 6 Q. B. D. 46; see too *Parsons* v. *Tinling*, 2 C. P. D. 119. Many of these enactments have in consequence been repealed by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), Sched. Pt. II.

Acts silent as to costs.

Where any public or private Act is silent as to the costs of any proceedings under it in the High Court, this order extends to the case and supplies the omission: *Ex p. Mercers' Co.*, 10 Ch. D. 481; *Ex p. Hospital of St. Katherine*, 17 Ch. D. 378.

Against what persons.

As to costs in probate cases against a married woman having separate estate, see *Morris* v. *Freeman*, 3 P. D. 65. As to costs against a next friend, see *Caley* v. *Caley*, 25 W. R. 528. As to the personal liability of an executor for costs where he carries on

an action commenced by his testator, see *Boynton* v. *Boynton*, 4 App. Cas. 733, H. L. **Order LV. r. 1.**

The costs of third parties may be ordered to be paid either by the defendant: *Dawson* v. *Shepherd*, 49 L. J. Ex. 529, C. A.; or by the plaintiff: *Witham* v. *Vane*, 28 W. R. 812; or may be ordered to be paid by the third parties themselves: *Williams* v. *South-Eastern Railway*, 26 W. R. 352; *Yorkshire Waggon Co.* v. *Newport Coal Co.*, 5 Q. B. D. 268; or the third party may have to pay the plaintiff's costs: *Hornby* v. *Cardwell*, 8 Q. B. D. 329, C. A. See further *Beynon & Co.* v. *Godden & Co.*, 4 Ex. D. 246, C. A. **Third parties.**

This order probably does not affect the statutes which in certain cases give double and treble costs: see *Garnett* v. *Bradley*, 3 App. Cas. at 970, H. L., per Ld. Blackburn. Costs under these statutes are rather in the nature of damages or penalty than costs proper. By 5 & 6 Vict. c. 97, ss. 1, 2, the provisions of any public or private Act which give double or treble costs are repealed, and full costs, charges, and expenses are substituted therefor. But this enactment cannot affect subsequent statutes, and there are several Acts passed since 1842 under which double and treble costs are to be given; see, for instance, s. 18 of the County Courts Act, 1850 (13 & 14 Vict. c. 61); and s. 49 of the Prisons Act, 1865 (28 and 29 Vict. c. 126). **Double and treble costs.**

The discretion given by this order is very wide. The Court may order the costs to be paid by the parties in definite proportions, or may order one party to pay to the other a fixed sum in lieu of taxed costs: *Wilmott* v. *Barber*, 17 Ch. D. at 774, C. A.; or may even make a successful plaintiff pay the whole costs of the other side: *Harris* v. *Petherick*, 4 Q. B. D. 611; *Fane* v. *Fane*, 13 Ch. D. 228; but where the case has been tried by a jury, the Court, in dealing with the costs, must assume the correctness of the findings of the jury: *Harnett* v. *Vyse*, 5 Ex. D. 307, C. A. And where a plaintiff has no cause of action, the defendant cannot be made to pay the whole costs of the action: *Dicks* v. *Yates*, 18 Ch. D. 76, C. A. See too *Foster* v. *G. W. Ry.*, 30 W. R. 398, C. A. Wide though the discretion is, it is a judicial discretion, and must be exercised on fixed principles; for instance, where a party successfully enforces a legal right, and in no way misconducts himself, then (subject to s. 5 of the County Courts Act, 1867), he is entitled to costs as of right: *Cooper* v. *Whittingham*, 15 Ch. D. 501; see too *The Condor*, 4 P. D. 120, C. A. As to how far the Court may regard the behaviour of the parties external to the conduct of the suit itself, see *Harnett* v. *Vyse*, *ubi suprà*. In many classes of cases the Courts award costs on settled principles, but it is always in the discretion of the Court to depart from the rule where the circumstances of the particular case require it. The distinction between costs awarded according to a general rule and costs awarded in the exercise of a discretion on particular facts is important, because an appeal lies from an order awarding costs on a wrong principle; but no appeal lies from the exercise of an erroneous discretion on particular facts: see s. 49 of the Act of 1873, *ante*, p. 60, and note thereto. For examples of settled rules as to costs, see, as to costs in collision cases where neither party is to blame, *The City of Cambridge*, 35 L. T. 781, C. A., *The Innisfail*, 35 L. T. 819, where both parties are to blame, *The City of Manchester*, 5 P. D. 221, C. A. *The Milanese*, 43 L. T. 107, C. A.; where a plea of compulsory pilotage is proved, *The Matthew Clay*, 5 P. D. 49; as to costs of a defendant whose interest has ceased: *Wymer* v. *Dodds*, 11 Ch. D. 436; as to costs where the plaintiff has no title to sue: *Dicks* v. *Yates*, 18 **Discretion.**

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Ch. D. 76, R. A.; as to costs of an application to stay proceedings pending an appeal: *Cooper* v. *Cooper*, 2 Ch. D. 492, C. A. See further *Morgan and Davey on Costs.*

Event.

The term "event" in this rule refers to the result of the whole litigation. Thus where a non-suit is set aside, and a new trial had, which results in the plaintiff's favour, the above rule gives him his costs of both trials: *Creen* v. *Wright*, 2 C. P. D. 354; and in any case where a new trial is had, the successful party in second trial is, in the absence of an order to the contrary, entitled to the costs of both trials and of the order for the new trial: *Field* v. *Great Northern Railway*, 3 Ex. D. 361.

The term "event" is to be read distributively: *Ellis* v. *De Silva*, 6 Q. B. D. at 524, C. A. Thus where the plaintiff joins in his claim different causes of action (as for instance libel, trespass, and malicious prosecution) and the plaintiff succeeds on one issue, but the defendant succeeds on the others, the plaintiff (subject to the County Courts Act, 1867) is entitled to the general costs of the action, but the defendant is entitled to the costs of the issues on which he has succeeded: *Myers* v. *Defries*, 5 Ex. D. 180, C. A.; *Sparrow* v. *Hill*, 8 Q. B. D. 479, C. A., distinct claims for liquidated sums: *Abbot* v. *Andrews*, W. N. 1882, p. 62, nonsuit on some issues; see *Knight* v. *Purcell*, 11 Ch. D. 412, as to issues in the Chancery Division. Where the plaintiff establishes his claim, but

Set-off.

the defendant establishes a set-off of equal amount, the defendant is entitled to the costs of the action: see per Cockburn, C. J. in *Stooke* v. *Taylor*, 5 Q. B. D. at 576; per Brett, L. J. in *Baines* v. *Bromley*, 6 Q. B. D. at 694, C. A., and perhaps the same rule applies

Counter-claim.

to a counter-claim for a liquidated sum, *ibid.* Where the plaintiff establishes his claim, and the defendant establishes a counter-claim in the return of a cross action, the plaintiff (subject to s. 5 of the County Courts Act, 1867, *ante*, pp. 68, 69) is entitled to the costs of the action, and the defendant to the costs of the counter-claim: *Halliman* v. *Price*, 41 L. T. 627; *Stooke* v. *Taylor*, 5 Q. B. D. at p. 576; *Gray* v. *Davidson*, 5 Ex. D. 189, C. A.; *Ellis* v. *De Silva*, 6 Q. B. D. 521, C. A. As to the proper principle of taxation in such cases, see per Brett, L. J. in *Baines* v. *Bromley*, 6 Q. B. D. at 695, C. A., where the decision turned on the terms of a particular order as to costs. In the Chancery Division it is settled that where claim and counter-claim are both dismissed, the defendant is entitled to the general costs of the action, and the plaintiff is entitled to the extra costs occasioned by the counter claim: *Sauer* v. *Bilton*, 11 Ch. D. 416; *Mason* v. *Brentini*, 15 Ch. D. 287, C. A. The same rule would presumably be applied in jury cases, and in the other Divisions.

Judge at trial.

The discretion given by this rule as to costs in jury cases may be exercised either by the judge at the trial or by the Court subsequently. The rule requires the order to be made "upon application." If counsel are ready to apply, and the judge anticipates the application, this is clearly sufficient: *Collins* v. *Welch*, 5 C. P. D. 27, C. A., and see per Ld. Selborne in *Marsden* v. *Lancashire & Yorkshire Railway*, 7 Q. B. D. 641, C. A.; but in so far as *Turner* v. *Heyland*, 4 C. P. D. 432, decides that the words "upon application" may be wholly disregarded, it seems inconsistent with the view taken by the Court of Appeal. The words "at the trial" mean substantially at the trial: *Collins* v. *Welch*, 5 C. P. D. at 33, C. A. An application made at the same sitting of the Court is sufficient: *Kynaston* v. *McKinder*, 37 L. T. 390, C. A.; but an application made to the judge who tried the case four days afterwards, *The Tyne Alkali Co.* v. *Lawson*, 36 L. T. 100, or to the same or another judge sitting at chambers, cannot be entertained: *Baker* v. *Oakes*, 2 Q. B. D. 171, C. A. As to the rule in the

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Chancery Division when there is no jury, see *Fritz* v. *Hobson*, 14 Ch. D. 542. When the judge exercises his discretion and at the trial makes an order as to costs under this rule, it is not clear whether any appeal lies from the order so made: see per Brett L. J. in *Collins* v. *Welch*, 5 C. P. D. at p. 33, and s. 49 of the Act of 1873, *ante*, p. 60, and note thereto. If there be an appeal it lies to the Court of Appeal, and not to the Divisional Court: *Marsden* v. *Lancashire & Yorkshire Railway*, 29 W. R. 580, C. A.

The Court.

Where in a jury case the judge at the trial has made no order, the Divisional Court has under this rule an original jurisdiction to deal with the costs, and may make an order depriving the successful party of costs: *Myers* v. *Defries*, 4 Ex. D. 176, C. A.; *Siddons* v. *Lawrence*, 4 Ex. D. 176, C. A.

Interlocutory costs.

Where the costs of an interlocutory matter have been finally awarded by the Court of Appeal the successful party is entitled to have them taxed, although the action is still pending: *Phillips* v. *Phillips*, 5 Q. B. D. 60, C. A.; see too *Beynon* v. *Godden & Co.*, 4 Ex. D. 246, C. A.; but the action will not be stayed until they are paid: *Morton* v. *Palmer*, 51 L. J. Q. B. 307. As to reserving the question of interlocutory costs until the trial, see *Hodges* v. *Hodges*, 25 W. R. 162, M. R. As to liberty to apply for costs of an interlocutory proceeding where no order has been made at the time, see *Fritz* v. *Hobson* 14 Ch. D. 542.

Shorthand notes.

Where shorthand notes are used, application that the costs of the notes may be allowed on taxation should be made to the court at the time judgment is given in the proceeding in which they are used: *Watson* v. *Great Western Railway*, 6 Q. B. D. 163; *Kirkwood* v. *Webster*, 9 Ch. D. 239; *Earl De la Warr* v. *Miles*, 19 Ch. D. 80, C. A. Perhaps the same rule applies wherever a party desires to get the costs of any exceptional proceeding which would not ordinarily be allowed on taxation.

Scales and taxation.

For scales of costs, the discretion of the taxing officer, the mode of taxing, and reviewing the taxation of costs, special allowances, the costs of witnesses qualifying themselves, and other matters relating to costs, see R. S. C. (Costs), *post*, pp. 604, *et seq.*

Between co-defendants.

A defendant, it seems, cannot enforce contribution for costs against a co-defendant by action: *Dewsley* v. *Middleweek*, 18 Ch. D. 236, Fry J. As to an order on one defendant to pay the costs of another: see *Ludow* v. *Great Britain Ass. Co.*, 17 Ch. D. 600, C. A.

Enforcement.

See O. XLII., r. 15, as to the issue of writs of fi. fa. and elegit for costs. For a form of fi. fa. for costs see App. F, form, 1a, *post*, p. 560. For forms of judgments for costs see App. D. forms Nos. 13, 14, 15. By O. XLVII., r. 2, *ante*, p. 383, no subpœna for costs and, except by leave, no sequestration to enforce payment of costs is to issue. As to the appointment of a receiver in order to recover costs from a married woman having separate estate, see *Bryant* v. *Bull*, 10 Ch. D. 153. It seems that a party entitled to costs may sue for them: *Philpott* v. *Lehain*, 35 L. T. 855.

As to staying proceedings in a second action where the plaintiff has not paid the costs of the first, see *Cannot* v. *Morgan*, 1 Ch. D. 1, C. A.

Witness qualifying.

The rule of the Common Law Courts used to be, that the costs of witnesses qualifying themselves to give evidence could never be allowed on taxation. But now, by R. S. C. (Costs), Special Allowances, *post*, p. 626, r. 8, which is of force in all divisions, and which gives power to allow the reasonable expenses of "procuring evidence," such costs may be allowed when reasonable: *Mackley* v. *Chillingworth*, 2 C. P. D. 273.

Jurisdiction.

As to the Court's power over costs when it has no jurisdiction over the subject matter of an application, see *Brown* v. *Shaw*,

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1 Ex. D. 425 : *Great Northern Committee and Inett*, 2 Q. B. D. 284.

Interest.

Interest on costs runs, now, from the date of the master's certificate : *Schroeder* v. *Cleugh*, 46 L. J. C. P. 365.

R. 2.

Security for costs.

(R. S. C., Feb. 1875, r. 7.)

2. In any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such time or times, and in such manner and form, as the Court or a judge shall direct.

In the Court of Chancery, before the Judicature Acts, security for costs was limited to a fixed and arbitrary sum, except in cases within the Companies Act, 1862, s. 69. In the Common Law Courts substantial security, varying in amount according to the requirements of the case, might always have been required. The latter is now adopted in all divisions ; see *Republic of Costa Rica* v. *Erlanger*, 3 Ch. D. 62, C. A.

As to security for costs where a married woman is allowed to sue alone, see O. XVI., r. 8, *ante*, pp. 230, 231.

As to security for costs, where the plaintiff is a limited company with insufficient assets, see the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 69, and note thereto in Buckley, ed. 3, p. 152 : also *Northampton Coal Co.* v. *Midland Waggon Co.*, 7 Ch. D. 500 C. A. ; where the plaintiff is bringing a second action of ejectment against the same defendant, see C. L. P. Act, 1854, s. 93, and note thereto in Day ; where the plaintiff becomes bankrupt after action brought, see s. 142 of the C. L. P. Act, 1852, and note thereon in Day, ed. 4 ; where a plaintiff resident in Scotland or Ireland is proceeding on the certificate of a Scotch or Irish judgment, see the Judgments Extension Act (31 & 32 Vict. c. 54), s. 5. As to security for costs of appeal, see O. LVIII., r. 15, *post*, p. 429.

Security may be ordered in respect of past as well as future costs, but the application for security should be made promptly : *Brocklebank* v. *King's Lynn Steamship Co.*, 3 C. P. D. 365 ; *Massey* v. *Allen*, 12 Ch. D. 807.

The poverty of the plaintiff is no ground for requiring security for costs : *Ross* v. *Jaques*, 8 M. & W. 135. In *Brocklebank* v. *King's Lynn Steamship Co.*, 3 C. P. D. 365, a plaintiff who filed a liquidation petition pending action was ordered to give security for costs.

The ordinary ground on which security is ordered is residence abroad. A defendant cannot be compelled to give security for costs, and on this principle a shareholder in a company, resident abroad, who appears to oppose a petition for winding up the company, cannot be compelled to give security for costs : *Re Percy and Kelly Nickel Co.*, 2 Ch. D. 531, M. R. The substantial and not the nominal position of the parties must be looked at. Thus, where one of the defendants in an interpleader issue was really interested in the result as a plaintiff, it was held that he could not compel the nominal plaintiff, a foreigner resident abroad, to give security : *Belmonte* v. *Aynard*, 4 C. P. D. 221 ; affirmed 4 C. P. D. 352, C. A. In *The Julia Fisher*, 2 P. D. 115, the defendant in an action for negligence, a foreigner resident abroad, who set up a counterclaim, was ordered to give security for costs ; but in *Mapleson* v. *Masini*, 5 Q. B. D. 144, where a plaintiff sued for breach of contract, and the defendant, a foreigner resident abroad, counterclaimed in respect of breaches of the same contract, it was held

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the defendant could not be compelled to give security. In *Winterfield* v. *Bradnum*, 3 Q. B. D. 324, the defendant admitted the claim, but set up a counter-claim against the plaintiff, who was a foreigner resident abroad. It was held that by so doing the defendant disentitled himself from asking for security for costs from the plaintiff.

In *Redondo* v. *Chaytor*, 4 Q. B. D. 453, C. A., it was held that a foreigner, usually resident abroad, but who is temporarily residing in England for the purpose of bringing an action, cannot be compelled to give security. In *The Don Ricardo*, 5 P. D. 121, the Court declined to make the mate of a foreign vessel, who sued for wages, give security for costs.

In *Massey* v. *Allen*, 12 Ch. D. 807, a plaintiff who, after action brought, went to reside out of the jurisdiction, was ordered to give security for costs.

When an order for security for costs is made, it is made on the terms that proceedings shall be stayed until security is given. If the security is not given, the defendant may apply to have the action dismissed for want of prosecution: *La Grange* v. *McAndrew*, 4 Q. B. D. 210. An analogous practice is adopted by the Court of Appeal, when security for the costs of an appeal is ordered, but not given: *Polini* v. *Gray*, 11 Ch. D. 741, C. A.

R. S. Security for costs where given by bond.

3. Where a bond is to be given as security for costs, it shall, unless the Court or a judge otherwise directs, be given to the party or person requiring the security, and not to an officer of the Court.

(R. S. C., April, 1880, r. 41.)

ORDER LVI.

Order LVI.

Notices and Paper, &c.

R. 1. Notice

1. All notices required by these Rules shall be in writing, unless expressly authorised by a Court or judge to be given orally.

R. 2. Printing. Paper.

2. Proceedings requiring to be printed shall be printed on cream wove machine drawing foolscap folio paper, 19 lbs. per mill ream, or thereabouts, in pica type leaded, with an inner margin about three quarters of an inch wide, and an outer margin about two inches and a half wide.

This rule is taken from Chan. Cons. Ord. IX., r. 3; Morgan's Acts and Orders, p. 409, ed. 4; Dan. Ch. Pr. 322, ed. 5.

For regulations as to printing, delivery of copies, costs, &c., see R. S. C. (Costs), O. V., *post*, p. 605.

R. 3. Affidavits.

3. Any affidavit may be sworn to either in print or in manuscript, or partly in print and partly in manuscript.

See R. S. C. (Costs), O. V., *post*, p. 605.

ORDER LVII.

TIME.

R. 1. Word "Month."

1. Where by these Rules, or by any judgment or order given or made after the commencement of the Act, time for doing any act or taking any proceeding is limited by months, not expressed to be lunar months, such time shall be computed by calendar months.

R. 2. Time under six days. Exclusion of Sunday, Christmas Day, and Good Friday.

2. Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time.

Rules 2 and 3 are founded on the Chan. Cons. Ord. XXXVII., Rules 11, 12; Morgan's Acts and Orders, pp. 569, 570. ed. 4.

Where the limited period is not less than six days, Sundays are counted: *Ex parte Viney*, W. N. 1877, p. 53, C. A. In such cases it is only when the last day is Sunday that, by the next rule, an extension is given.

R. 3. Time, where last day is Sunday.

3. Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.

Under this rule, where the eight days wherein to appeal from chambers limited by O. LIV., r. 6, *ante*, p. 403, expires on Sunday, the motion may be made the next day: *Taylor* v. *Jones*, 45 L. J. C. P. 110.

See note to the last rule.

Pleading in vacation.

4. No pleadings shall be amended or delivered in the long vacation, unless directed by a Court or a judge.

Hitherto in the Common Law Courts no pleadings could be delivered during the long vacation. It may now be done if an order for the purpose be obtained.

Exclusion of long vacation from time for pleading.

5. The time of the long vacation shall not be reckoned in the computation of the times appointed or allowed by these Rules for filing, amending, or delivering any pleading, unless otherwise directed by a Court or a judge.

6. A Court or a judge shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

R. 6. Enlargement or abridgement of time.

This rule perhaps does not apply to appeals from County Courts; *Tennant* v. *Rawlings*, 4 C. P. D. 133; but see *Mason* v. *Wirral Local Board*, 4 Q. B. D. 459; and where an order is made dismissing an action unless some act is done within a specified time, if the order be not appealed against, the time for doing the act cannot be enlarged after it has expired, for the action is dead: *Whistler* v. *Hancock*, 3 Q. B. D. 83; *King* v. *Davenport*, 4 Q. B. D. 402; but the time for appealing against such an order may in a proper case be enlarged after it has expired: *Burke* v. *Rooney*, 4 C. P. D. 226; *Carter* v. *Stubbs*, 6 Q. B. D. 116, C. A.

The rule does not apply to cases where acts are required to be done in a certain order, and that order is departed from. Thus application for leave to join another cause of action with an action for the recovery of land must be made before writ issued, and if it be not so made, there is no power under this rule, to enlarge the time for application and allow the action to continue: *Pilcher* v. *Hinde*, 11 Ch. D. 905, C. A., nor does the rule empower the court to authorize an application as to costs, which by O. LV. r. 1, if made to the judge, must be made at the trial, to be made to the judge at a later period: *Baker* v. *Oakes*, 2 Q. B. D. 171, C. A.

As regards cases falling within the application of the rule, the various decisions must be regarded as instances of the exercise of the discretion vested in the court, and not as laying down any fixed and binding rule, see per Ld. Selborne in *Carter* v. *Stubbs*, 6 Q. B. D. at p. 119, C. A. In *The International Financial Society* v. *City of Moscow Gas Co.*, 7 Ch. D. 241, C. A., see at p. 247, a party desiring to appeal, misconstrued the rules, and thinking that he had twenty-one days from the time when judgment was entered, did not appeal within twenty-one days of the time when judgment was pronounced. The Court refused to extend the time. As to the extension of time for appealing to the Court of Appeal, see further O. LVIII. r. 15 and the note thereto, *post*, p. 427. As to enlarging time to appeal in other cases where no Appellate Court sits within the prescribed limit, see *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, H. L., which turned on O. LIV. r. 6, now repealed. See also O. LIV., r. 4, and notes thereto. In *Doyle* v. *Kaufman*, 3 Q. B. D. 7, affirmed by C. A., *ibid.*, p. 340, the Court refused to extend the time for renewing a writ of summons where in the absence of such renewal the claim would be barred by the Statute of Limitations; but in a case where the statute was defeated by renewing a writ, Malins, V.-C., allowed an extension of time for delivering a statement of claim, which owing to a slip made by the solicitor's clerk was two days too late:

Order LVII.

Canadian Oil Works Corporation v. *Hay*, W. N. 1878, p. 107. In *Eyre* v. *Cox*, 46 L. J. Ch. 316, leave was given to renew a writ after the expiration of the twelve months; and in *Hastings* v. *Hurley*, 16 Ch. D. 734, the time for indorsing on a writ the date of service was extended after the limit fixed by O. IX. r. 13, had expired.

As to enlarging time for setting aside judgment for default of appearance at trial under O. XXXVI., r. 20, see *Michael* v. *Wilson*, 25 W. R. 380, C. A.

R. 6a. Enlargement of time by consent. (R. S. C., April, 1880, r. 42.)

6a. The time for delivering or amending any pleading may be enlarged by consent in writing, without application to the Court or a judge.

R. 7. Admiralty action. (R. S. C., Feb. 1876, r. 8.) Acceleration of trial. Abridgment of times.

7. In Admiralty actions the Court or a judge shall have power at any stage of the proceedings in such action, upon a motion or summons by either party, calling upon the other party to show cause why the trial of such action should not take place on an early day to be appointed by the Court or a judge, to appoint that such trial shall take place on any day or within any time which to the Court or judge shall seem fit; and for such purpose the Court or judge shall have power upon such motion or summons to dispense with the giving of notice of trial, or to abridge the time or times appointed by these rules for giving such notice, for the delivery of pleadings, or for doing any other act or taking any other proceeding in the action, upon such terms (if any) as the nature of the case may require.

R. 8. Service. (R. S. C., April, 1880, r. 42.)

8. Service of pleadings, notices, summonses, orders, rules, and other proceedings shall be effected before the hour of six in the afternoon, except on Saturdays, when it shall be effected before the hour of two in the afternoon. Service effected after six in the afternoon on any weekday except Saturday shall be deemed to have been effected on the following day. Service effected after two in the afternoon on Saturday shall be deemed to have been effected on the following Monday.

Notice of an injunction may it seems be given by telegram: *Ex parte Langley*, 13 Ch. D. 110, C. A. As to substituted service, see *Slade* v. *Hulme*, 30 W. R. 28. For form of affidavit of service, see B. No. 24, *post*, p. 485.

ORDER LVIIa.

Order LVIIa.

Divisional and other Courts.

1. The following proceedings and matters shall continue to be heard and determined before the Divisional Courts; but nothing herein contained shall be construed so as to take away or limit the power of a single judge to hear and determine any such proceedings or matters in any case in which he has heretofore had power to do so, or so as to require any interlocutory proceeding therein heretofore taken before a single judge to be taken before a Divisional Court:— R. 1. Proceedings to be taken before Divisional Courts. (R. S. C., Dec. 1876, r. 8.)

Proceedings on the Crown side of the Queen's Bench Division. Crown paper.

Appeals from Revising Barristers, and proceedings relating to Election Petitions, Parliamentary and Municipal. Registration Appeals.

Appeals under section 6 of the County Courts Act, 1875. County Court Appeals.

Proceedings on the Revenue side of the Exchequer Division. Revenue cases.

Proceedings directed by any Act of Parliament to be taken before the Court, and in which the decision of the Court is final. Where no appeal.

Cases stated by the Railway Commissioners under the 36 & 37 Vict. c. 48. Cases by Railway Commissioners.

Cases of Habeas Corpus, in which a judge directs that a rule nisi for the writ, or the writ be made returnable before a Divisional Court. Habeas Corpus.

Special cases where all parties agree that the same be heard before a Divisional Court. Special case by consent.

Appeals from Chambers in the Queen's Bench, Common Pleas, and Exchequer Divisions, and applications for new trials in the said Division[1] where the action has been tried with a jury. Appeals from chambers.

[1] *Sic.*

By the Appellate Jurisdiction Act, 1876:—

[S. 17. On and after the first day of December, one thousand eight hundred and seventy-six, every action and proceeding in the High Court of Justice, and all business arising out of the same, except as hereinafter provided, shall, so far as is practicable and convenient, be heard, determined, and disposed of before a single Powers of single judge.

Order LVIIa. r. 1.

judge, and all proceedings in an action subsequent to the hearing or trial, and down to and including the final judgment or order, except as aforesaid, and always excepting any proceedings on appeal in the Court of Appeal, shall so far as is practicable and convenient be had and taken before the judge before whom the trial or hearing of the cause took place: Provided nevertheless, that Divisional Courts of the High Court of Justice may be held for the transaction of any business which may for the time being be ordered by Rules of Court to be heard by a Divisional Court; and any such Divisional Court when held shall be constituted of two judges of the Court and no more, unless the President of the Division to which such Divisional Court belongs, with the concurrence of the other judges of such Division, or a majority thereof, is of opinion that such Divisional Court should be constituted of a greater number of judges than two, in which case such Court may be constituted of such number of judges as the President, with such concurrence as aforesaid, may think expedient; nevertheless, the decisions of a Divisional Court shall not be invalidated by reason of such Court being constituted of a greater number than two judges; and

Divisional Courts.

Rules of Court for carrying into effect the enactments contained in this section shall be made on or before the first day of December, one thousand eight hundred and seventy-six, and may be afterwards altered, and all Rules of Court to be made after the passing of this Act, whether made under the Supreme Court of Judicature Act, 1875, or this Act, shall be made by any three or more of the following persons, of whom the Lord Chancellor shall be one, namely, the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and four other judges of the Supreme Court of Judicature to be from time to time appointed for the purpose by the Lord Chancellor in writing under his hand, such appointment to continue for such time as shall be specified therein, and all such Rules of Court shall be laid before each House of Parliament within such time and subject to be annulled in such manner as is provided by the Supreme Court of Judicature Act, 1875.]

The rules of this Order, which form part of the R. S. C., Dec. 1876, were framed to give effect to this section. See notes to O.

XXXVI., r. 22a, *ante*, p. 327; O. XXXIX., *ante*, p. 350; and O. XL., *ante*, p. 354. Order LVIIa. rr. 1—3.

If a party appeals to a Divisional Court, and does not appear to support his appeal, and judgment is given against him in his absence, the Court of Appeal will not entertain an appeal from the judgment of the Divisional Court: *Walker* v. *Budden*, 5 Q. B. D. 267, C. A.

2. Where, by section 17 of the Appellate Jurisdiction Act, 1876, or by these Rules, any application ought to be made to, or any jurisdiction exercised by the judge before whom an action has been tried, if such judge shall die or cease to be a judge of the High Court, or if such judge shall be a judge of the Court of Appeal, or if for any other reason it shall be impossible or inconvenient that such judge should act in the matter, the President of the Division to which the action belongs may either by a Special Order in any action or matter, or by a General Order applicable to any class of actions or matters, nominate some other judge to whom such application may be made, and by whom such jurisdiction may be exercised. R. 2. Where proceedings after trial cannot be taken before judge who tried. (R. S. C., Dec. 1876, r. 9.)

3. Every vacation judge shall have the same power and authority as heretofore. R. 3. Vacation judge. (R. S. C., Dec. 1876, r. 10.)

As to the authority of vacation judges, see s. 28 of the Act of 1873, *ante*, p. 38; and O. LXI. r. 5, *post*, p. 441, and note thereto.

Order LVIII.

ORDER LVIII.

APPEALS.

1. Bills of exceptions and proceedings in error shall be abolished. R. 1. Bill of exceptions and error abolished.

There were formerly several modes, according to the practice of the Common Law Courts, of reaching the Exchequer Chamber. One was by Bill of exceptions, excepting to the direction in point of law of the judge at the trial. A second was by proceedings in error, where the miscarriage complained of appeared upon the face of the recorded proceeding. A third was by appeal from judgments refusing, discharging, or making absolute rules for new trials, or to enter verdicts under the C. L. P. Act, 1854, ss. 34 to 44. Such appeals were upon cases stated for the purpose. Bills of exceptions and proceedings in error are abolished by this rule, and cases on appeal by the next rule; one uniform method of appeal by way of rehearing upon motion being adopted, from all the divisions. But though bills of exceptions are in form abolished, the right to go direct from the judge at the trial to the Court of Former practice.

Order LVIII. rr. 1—2.

Appeal in many of the same cases, and for the same purposes as by bill of exceptions, is preserved. See s. 22 of the Act of 1875, *ante*, p. 113, and note to s. 46 of the Act of 1873, *ante*, p. 57.

Application of order.

Appeals to the Court of Appeal in Chancery were by petition for rehearing, or where the order appealed from was made on motion, by appeal motion.

This Order has not, and never had, any application to appeals to the House of Lords: *Justice* v. *Mersey Steel and Iron Co.*, 1 C. P. D. 575. Such appeals are now governed by the Appellate Jurisdiction Act, 1876, *ante*, p. 128; and the Orders made for giving effect to it: *post*, p. 673.

This Order does apply to Bankruptcy Appeals: s. 18 of the Act of 1875, *ante*, p. 12; *Ex parte Viney*, 4 Ch. D. 794, C. A. And see *Ex parte Reddish*, 5 Ch. D. 882, C. A. It also applies to appeals from the Court of the County Palatine of Lancaster: *Lee* v. *Nuttall*, 12 Ch. D. 61, C. A.

By O. LXII. r. 1, criminal proceedings and proceedings for Divorce and other Matrimonial causes are expressly excepted from the operation of the Rules; but by O. LXII. r. 2, this order is expressly applied to all civil proceedings on the Crown side of the Queen's Bench Division and to all revenue proceedings.

By ss. 9, 10, of the Act of 1881, *ante*, p. 165, Divorce appeals which formerly went to the Full Court of Divorce are now to be heard by the Court of Appeal, but no rules have yet been made to carry out the details of the change thus effected.

R. 2.

Appeals, rehearing.

Motion.

2. All appeals to the Court of Appeal shall be by way of rehearing, and shall be brought by notice of motion in a summary way, and no petition, case, or other formal proceeding other than such notice of motion shall be necessary. The appellant may by the notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part.

The provisions of Order LVIII. introduce changes of the most important character, especially in the procedure of the Queen's Bench, Common Pleas, and Exchequer Divisions.

There was no mode of reviewing the decision of a Common Law Court except, first, by proceedings in error for defects apparent on the face of the record; or, secondly, in certain cases under the C. L. P. Act, 1854, against a judgment refusing, discharging, or making absolute a rule for a new trial, or to enter a verdict. From the vast number of judgments and rules not falling under either of these heads there was no appeal.

Under the present system, the general rule is that any judgment or order of any Court or Judge of the High Court is subject to an appeal to the Court of Appeal. The exceptions are those contained in the Act itself, or in other Acts. As to the general right of appeal, and whether in any particular case an appeal lies to the Court of Appeal or not, see s. 19 of the Act of 1873, *ante*, p. 13, and notes thereto.

By s. 47, *ante*, p. 58, no appeal to the Court of Appeal lies from any decision of the Court for Crown Cases Reserved, nor

Order LVIII. rr. 2—3.

It will be observed that an appellant need not give security for costs unless ordered to do so by the Court of Appeal: r. 15.

Incidental orders may, by s. 52 of the Act of 1873, be made by a single Judge of the Court of Appeal.

Vacations.

It will be observed that s. 28 of the Act of 1873 directs that provision shall be made by Rule of Court for the hearing of matters of urgency during vacation, by Judges of the Court of Appeal, as well as by Judges of the High Court. But though the rules do provide (O. LXI., *post*, p. 437) for the attendance of vacation Judges of the High Court, there is no such provision with regard to Judges of the Court of Appeal.

Counsel.

Two counsel are heard on each side in the Court of Appeal: *Sneesby* v. *Lancashire and Yorkshire Ry. Co.*, 1 Q. B. D. 42 C. A.

As to who begins in case of cross-appeals on cross-demurrers, see *Clarke* v. *Bradlaugh*, 7 Q. B. D. 38, C. A.

Leave to appeal, by a person affected but not a party, may be obtained from the Court of Appeal ex parte: *Re Markham*, 16 Ch. D. 1, C. A.

As to costs, see r. 5, *post*, and note thereto.

Appeal against part.

Where an order including several matters is made as regards some of them without jurisdiction, but that part of the order is not appealed against, the Court of Appeal will not interfere with that part: *West* v. *Donovan*, 27 W. R. 697, C. A.; but where the appellant appealed against part of a judgment, and the respondent gave a cross notice of appeal, it was held that the judgment might be varied in the appellant's favour on a point not covered by his notice of appeal: *Cracknall* v. *Janson*, 11 Ch. D. 1, C. A. If a respondent desires to have an order varied on a point in which the appellant has no interest, it seems he should give a substantive notice of appeal: *Re Cavander's Trusts*, 16 Ch. D. 270, C. A., but see *Ralph* v. *Carrick*, 11 Ch. D. 873, C. A. As to varying in part an order appealed against generally, see *Duchess of Westminster Silver Ore Co.*, 10 Ch. D. 308, C. A.

R. 3.

Notice of motion. Service.

3. The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all or any parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may seem just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties. Any notice of appeal may be amended at any time as to the Court of Appeal may seem fit.

Abandonment of appeal.

Notice of discontinuance by the plaintiff terminates an appeal: *Conybeare* v. *Lewis*, 13 Ch. D. 469, C. A.; and where an appeal has been formally withdrawn, the withdrawal cannot be rescinded. The proper course is to apply to the court for leave to give a fresh notice of appeal: *Watson* v. *Cave* (No. 2), 17 Ch. D. 23, C. A. Where the proceedings upon an appeal have been irregular, the notice of appeal may be abandoned and a fresh notice given, upon which the appeal will proceed: *Norton* v. *London & North-Western Railway*, 11 Ch. D. 118, C. A. Where an appeal is called on and the appellant does not appear, the respondent may have the appeal dismissed without proving that he was duly served with a notice

of appeal: *Ex parte Lowe*, 7 Ch. D. 160, C. A. Where an appeal is abandoned the respondent is entitled to his costs of appeal, and may apply to the Court of Appeal for them: *Charlton* v. *Charlton*, 16 Ch. D. 273, C. A.; but before applying to the court he should apply first to the appellant. If he do not do so he will not be allowed the costs of his application to the court: *Griffin* v. *Allen*, 11 Ch. D. 913, C. A. The application to the Court is on notice, not *ex parte*: *Re Oakwell Collieries*, 7 Ch. D. 706, C. A. As to the principle on which the costs of an abandoned appeal or other motion are taxed: see *Harrison* v. *Leutner*, 16 Ch. D. 559.

Notice.

A formal notice of intention to appeal has been held a sufficient notice of appeal under this rule: *Little's Case*, 8 Ch. D. 806, C. A. See the comments on this case in *Re Blyth*, 13 Ch. D. at p. 418, C. A. When a four days' notice of appeal was given where a fourteen days' notice ought to have been given, the Court allowed the notice to be amended: *Re Stockton Iron Furnace Co.*, 10 Ch. D. 335, at p. 348; and where a fourteen days' notice was given instead of a four days' notice, and the appellant withdrew it, thinking it irregular, and substituted a four days' notice, and the objection was taken that the second notice was too late, the Court extended the time: *Taylor's Case*, 8 Ch. D. 644, C. A.

Where in an administration suit there were three claimants to a fund, which was ordered to be paid to one of them, and one of the unsuccessful claimants appealed, he was directed to give notice of the appeal to the other unsuccessful claimant: *Hunter* v. *Hunter*, 24 W. R. 504, C. A.; see too *Purnell* v. *Great Western Railway*, 1 Q. B. D. 636, C. A.

Where a respondent seeks to have an order varied on a point in which the appellant has no interest, he should, it seems, give notice of appeal under this rule and not a notice under rule 6: *Re Carander's Trusts*, 16 Ch. D. 270, C. A., but see *Ralph* v. *Carrick*, 11 Ch. D. 873, C. A.

Notice of appeal from the refusal to annul an adjudication must be served on the trustee as well as the petitioning creditor: *Ex parte Ward*, 15 Ch. D. 292, C. A.

R. 4. Length of notice.

4. Notice of appeal from any judgment, whether final or interlocutory, shall be a fourteen days' notice, and notice of appeal from any interlocutory order shall be a four days' notice.

As to the distinction between matters interlocutory and final, see note to s. 12 of the Act of 1875, *ante*, p. 106. See further note to last rule.

R. 5. Powers of Court of Appeal. Amendment. Fresh evidence.

5. The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the Court of First Instance, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the

Order LVIII. r. 5a.

Judgment.

Court. The Court of Appeal shall have power to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the said Court, notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision. The Court of Appeal shall have power to make such order as to the whole or any part of the costs of the appeal as may seem just.

Costs.

R. 5a.

Power to order new trial.

(R. S. C., March, 1879, r. 9.)

If upon the hearing of an appeal from a judgment pronounced by a judge or Court on the verdict or finding of a jury, or of a judge without a jury, it shall appear to the Court of Appeal that a new trial ought to be had, it shall be lawful for the said Court of Appeal, if it shall think fit, to order that the verdict and judgment shall be set aside, and that a new trial shall be had.

Powers of Appeal Court.

As to the various jurisdictions vested in the Court of Appeal, see s. 18 of the Act of 1873, *ante*, p. 12; and as to the general right of appeal and the limitations thereon see s. 19 of the Act of 1873, *ante*, p. 13, and note thereto.

The powers of the Court of Appeal to deal with appeals which it has jurisdiction to entertain are defined by the Act of 1873. By s. 4 of that Act the Court of Appeal shall have and exercise appellate jurisdiction with such original jurisdiction as hereinafter mentioned as may be incident to the determination of any appeal; and by s. 19 for all the purposes of and incidental to the hearing of any appeal within its jurisdiction, and the amendment, execution, and enforcement of any judgment or order made on any such appeal, and for the purpose of every other authority expressly given to the Court of Appeal by this Act, the said Court of Appeal shall have all the power, authority and jurisdiction by this Act vested in the High Court of Justice.

By r. 14, *post*, p. 427, an interlocutory order, not appealed from, is not to prejudice the final decision.

The Court of Appeal has no original jurisdiction except such as is incident to the hearing of an appeal: *Re Dunraven Adare Coal and Iron Co.*, 24 W. R. 37, C. A.; *Allan* v. *Electric Telegraph Co.*, 24 W. R. 898, C. A.; *Flower* v. *Lloyd*, 6 Ch. D. 297, C. A.

The Court of Appeal has no power to re-hear an appeal from the High Court, even on grounds of fraud: *Flower* v. *Lloyd*, 6 Ch. D. 297, C. A; see also *Reynon* v. *Godden & Co.*, 4 Ex. D. 246, C. A. As to whether an action lies to set aside a judgment obtained by fraud, see *Flower* v. *Lloyd*, *supra*, and *Flower* v. *Lloyd* (2nd case), 10 Ch. D. 327, C. A. There is perhaps power to re-hear a bankruptcy appeal, under s. 71 of the Bankruptcy Act, 1869: see *Re Hooper*, 14 Ch. D. 1, but the point is very doubtful.

The Court of Appeal can perhaps order a new trial as to one defendant in an action founded on tort without disturbing the verdict against the other defendants: *Purnell* v. *Great Western Railway*, 1 Q. B. D. 636, C. A., per Mellish, L. J.

Order LVIII. r. 5.

One of several plaintiffs, suing in the same interest, may appeal though the others refuse to join in the appeal: *Beckett* v. *Attwood*, 18 Ch. D. 54, C. A.

Where an appellant dies after his appeal has been entered and his executor desires to prosecute the appeal, application for leave to do so should be made to the Court of First Instance and not to the Court of Appeal: *Ransom* v. *Patten*, 44 L. T. 688, C. A. The application is made by summons at chambers. See further O. L., *ante*, p. 385.

Application for a stay of execution pending an appeal to the House of Lords should be made to the Court of Appeal: *The Khedive*, 5 P. D. 1, C. A.

As to varying the minutes of an order made on appeal, see *General Share and Trust Co.* v. *Wetley*, 20 Ch. D. 130, C. A.

Amendment.

As to amendment see O. XVI., r. 13, parties; O. XXVII., pleadings; O. XLI. A., judgments: and O. LIX., r. 2, proceedings generally. Where at the trial application to amend the pleadings is made and refused, and judgment is given against the applicant, an appeal against the judgment includes an appeal against the order refusing leave to amend: *Laird* v. *Briggs*, 16 Ch. D. 663, C. A.

Practice.

As to the mode of bringing before the Court of Appeal the evidence taken in the Courts below, see r. 11, *post*, p. 426. And as to printing evidence, r. 12, *ibid.* As to security for costs upon appeal, see r. 15, *post*, p. 429.

Fresh evidence.

Where it is desired to adduce fresh evidence either documentary or on affidavit, the proper course is to give notice to the other side that it is intended to ask for leave at the hearing to give such evidence: *Hastie* v. *Hastie*, 1 Ch. D. 562, C. A.; *Justice* v. *Mersey Steel and Iron Co.*, 24 W. R. 199, C. A.; but where a party wishes to examine fresh witnesses at the hearing of the appeal, he should make a special application for leave before the hearing: *Dicks* v. *Brooks*, 13 Ch. D. 652, C. A.

In *Gover's Case*, 24 W. R. 36, C. A., the Court of Appeal gave leave to subpœna a witness without deciding at the time whether his evidence would be admitted.

In *Bigsby* v. *Dickinson*, 4 Ch. D. 24, C. A.; and *Jones* v. *Chennell*, 8 Ch. D. 492, see at p. 505, C. A., evidence improperly rejected by the Court below was admitted by the Court of Appeal. See too *McCollins* v. *Gilpin*, W. N., 1881, p. 30. Where evidence is wrongly received in the Court below, but no objection is taken to it, the objection cannot, it seems, be taken in the Court of Appeal: *Gilbert* v. *Endean*, 9 Ch. D. 259, C. A. In *Weston's Case*, 10 Ch. D. 579, see at p. 582, C. A., the Court of Appeal declined to let an appellant give oral evidence in his own favour.

An appellant is not, it seems, entitled to raise on appeal a new case inconsistent with his former case, even though the evidence given below is sufficient, without fresh evidence: *Ex p. Reddish*, 5 Ch. D. 882, C. A. See too *Ex parte Firth*, 19 Ch. D. 419, C. A.

See *Re Hooper*, 14 Ch. D. 1, C. A., as to the omission of evidence before the Court of Appeal which it is desired to use in the House of Lords.

Shorthand notes.

Shorthand notes are admissible as representing a party's impression of what took place in the Court below, but the Court of Appeal assumes the correctness of the judge's notes: *Laming* v. *Gee*, 28 W. R. 217, C. A. The costs of shorthand notes are not to be allowed too freely. A proper case for the allowance must be shown: *Re Duchess of Westminster Silver Ore Co.*, 10 Ch. D. 307, C. A.; *Kelly* v. *Byles*, 13 Ch. D. 682, C. A.; and the

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costs of shorthand notes will certainly be disallowed unless special application to allow them is made at the time of hearing or judgment, when the Court is in a position to judge of their necessity: *Ashworth* v. *Outram*, 9 Ch. D. 483, C. A.; *Hill* v. *Metropolitan Asylums Board*, 28 W. R. 664, C. A.; *Earl De la Warr* v. *Miles*, 19 Ch. D. 80, C. A.

Affidavits.

Affidavits intended to be used on appeal should be filed with the officer of the Division from which the appeal comes: *Watts* v. *Watts*, 45, L. J. Ch. 658, C. A. As to notice to produce documents, see *Beynon* v. *Godden*, W. N., 1877, p. 257, C. A. As to the costs of unnecessary affidavits, see *Re Jones*, 14 Ch. D. 285, C. A.

Costs.

It is the rule that costs follow the event of an appeal, unless the Court for special reasons otherwise orders: per Lord Cairns, 1 Ch. D. 41; *Olivant* v. *Wright*, 45 L. J., Ch. 1, C. A. The same rule is adopted on appeal from a County Court in Bankruptcy: *Ex parte Masters*, 1 Ch. D. 113, C. J. B. And on appeals from inferior Courts: *Leach* v. *South-Eastern Ry. Co.*, 34 L. T. 134, App. I. C. The rule applies in an appeal to increase the amount of salvage in a salvage case: *The City of Berlin*, 2 P. D. 187, C. A., and apparently to appeals from the Admiralty Division generally. *The Condor*, 4 P. D. 115 C. A. As to the costs of an abandoned appeal, see note to r. 3, *supra*; and *Harrison* v. *Leutner*, 16 Ch. D. 559; as to cross appeals, see next rule. Where the costs of an interlocutory order have been dealt with by the Court of Appeal, and the case finally comes up to the Court of Appeal for decision on the merits, the costs of the interlocutory order cannot be reconsidered: *Beynon* v. *Godden*, 4 Ex. D. 246, C. A.

R. 6.

Cross appeal.

6. It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the Court below should be varied, he shall, within the time specified in the next Rule, or such time as may be prescribed by special order, give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not diminish the powers conferred by the Act upon the Court of Appeal, but may, in the discretion of the Court, be ground for an adjournment of the appeal, or for a special order as to costs.

Notice.

It will be observed, that the language of this rule, dispensing with the necessity for notice of motion by way of cross appeal, is perfectly general; it is not limited to the case in which a respondent seeks to have the decision of the Court below varied as against the party appellant alone. But if the matter of his complaint affects a third party, as, for instance, a co-respondent, the rule requires him to give notice to the party so affected. And an omission to give such notice would of course be ground for the Court exercising the power given to it in the last clause of the rule. See *Purnell* v. *Great Western Ry. Co.*, 1 Q. B. D. 636, C. A.; *Hunter* v. *Hunter*, 24 W. R. 504, 527, C. A. As to cross notice, see further *Ex parte Payne*, 11 Ch. D. 540, C. A., and see note to r. 2, *ante*, p. 420. Notice under this rule need not be given within the time limited by r. 15: *Ex parte Bishop*, 15 Ch. D. 400 C. A.

As to costs when there are cross notices of appeal and the order below is varied, see *Cracknell* v. *Johnson*, 11 Ch. D. 1, C. A.; *The Lauretta*, 4 P. D. 25, C. A. They are usually given distributively. As to costs when appellant succeeds, see *Johnstone* v. *Cox*, 19 Ch. D. 17 C. A.

R. 7. Length of such notice.

7. Subject to any special order which may be made, notice by a respondent under the last preceding Rule shall in the case of any appeal from a final judgment be an eight days' notice, and in the case of an appeal from an interlocutory order a two days' notice.

R. 8. Entry.

8. The party appealing from a judgment or order shall produce to the proper officer of the Court of Appeal the judgment or order or an office copy thereof, and shall leave with him a copy of the notice of appeal to be filed, and such officer shall thereupon set down the appeal by entering the same in the proper list of appeals, and it shall come on to be heard according to its order in such list, unless the Court of Appeal or a judge thereof shall otherwise direct, but so as not to come into the paper for hearing before the day named in the notice of appeal.

Under this rule, not only must the notice of appeal be given in time, but it must be entered before the day for which notice is given; otherwise it will be treated as abandoned: *Re National Funds Assurance Co.*, 4 Ch. D. 305, C. A. In *Re Mansel*, 7 Ch. D. 711, C. A., the appeal owing to a mistake of the solicitor's clerk was not set down till the day following the day specified in the notice. The Court dismissed the appeal and refused to extend the time. When, however, a defendant appealed but could not enter his appeal in time, owing to the omission of the plaintiff to draw up the order, the Court declined to entertain the objection on the ground of time: *Re Harker*, 10 Ch. D. 613, C. A. If the appeal is not set down, the respondent should not appear, but may make a substantive application for his costs: *Webb* v. *Mansel*, 2 Q. B. D. 117. This rule, requiring production of the order appealed from, applies only where an order is made, not where it is refused: *Smith* v. *Grindley*, 3 Ch. D. 80, C. A.

R. 9. Time to appeal in winding up, bankruptcy, &c.

9. The time for appealing from any order or decision made or given in the matter of the winding up of a company under the provisions of the Companies Act, 1862, or any Act amending the same, or any order or decision made in the matter of any bankruptcy, or in any other matter not being an action, shall be the same as the time limited for appeal from an interlocutory order under Rule 15.

The time for appealing from an interlocutory order is twenty-one days: r. 15, *post*. This is the same time prescribed for notice of appeal from an order in winding up by s. 124 of the Companies Act, 1862. The same period is fixed in bankruptcy by Rule 143 of the Bankruptcy Rules, 1870. See *Ex parte Tucker*, 12 Ch. D. 308,

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C. A., as to an appeal by a third party aggrieved by an adjudication of bankruptcy.

The limitation of time by this rule applies to the winding up order itself, as well as to any other order made in winding up: *Re National Funds Assurance Co.*, 4 Ch. D. 305, C. A. An appeal from an order under the Trustee Relief Act is within this rule, and must be brought within twenty-one days: *Re Baillie's Trusts*, 4 Ch. D. 785, C. A. So too is an order under the Vendor and Purchaser Act, 1874: *Re Blyth*, 13 Ch. D. 416, C. A.

As to extending the time, see *Re Jaques*, 30 W. R. 394, C. A.

R. 10. Ex parte application.

10. Where an ex parte application has been refused by the Court below, an application for a similar purpose may be made to the Court of Appeal ex parte within four days from the date of such refusal, or within such enlarged time as a judge of the Court below or of the Appeal Court may allow.

R. 11. Evidence of facts.

11. When any question of fact is involved in an appeal, the evidence taken in the Court below bearing on such question shall, subject to any special order, be brought before the Court of Appeal as follows:

(*a.*) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed.

(*b.*) As to any evidence given orally, by the production of a copy of the judge's notes, or such other materials as the Court may deem expedient.

As to receiving fresh evidence, see r. 5, *ante*, p. 423.

The Court of Appeal has, in several instances, to save expense to the parties, dispensed with the necessity of taking office copies of affidavits for the use of the Court. In *Sickles* v. *Norris*, 45 L. J. C. P. 148, C. A., the officer of the Court was directed to attend with the originals. In *Crawford* v. *Hornsea Co.*, 24 W. R. 422, C. A., the office copy taken by each side of its own affidavits, with the plain copies delivered to the opposite side, were held sufficient.

As to notice to produce documents, see *Beynon* v. *Godden*, W. N. 1877, p. 257, C. A.; and as to shorthand notes, see note to r. 5, *supra*.

As to the mode of proceeding if the notes of the evidence are lost, see *Ex parte Firth*, 19 Ch. D. at p. 426, C. A.

See note to the next rule.

R. 12. Printing evidence.

12. Where evidence has not been printed in the Court below, the Court below or a judge thereof, or the Court of Appeal or a judge thereof, may order the whole or any part thereof to be printed for the purpose of the appeal. Any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof, unless the Court of Appeal or a judge thereof shall otherwise order.

Evidence taken by affidavit under a consent must be printed: Order XXXVIII., r. 6, *ante*, p. 349. As to the mode of printing delivery of copies, costs, &c., see Order LVI., r. 2, *ante*, p. 411; R. S. C. (Costs), O. V., *post*, p. 605. **Order LVIII. rr. 12—15.**

In *Bigsby* v. *Dickinson*, 4 Ch. D. 24, C. A., the vivâ voce evidence being voluminous, and it being necessary to refer to it all, the Court of Appeal allowed the costs of the transcript and printing of shorthand notes of the evidence, but not those of the attendance of the shorthand writer.

13. If, upon the hearing of an appeal, a question arise as to the ruling or direction of the judge to a jury or assessors, the Court shall have regard to verified notes or other evidence, and to such other materials as the Court may deem expedient. **R. 13.** Direction of judge. Evidence.

14. No interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may seem just. **R. 14.** Interlocutory order not appealed from.

See *Laird* v. *Briggs*, 16 Ch. D. 663, C. A.; *White* v. *Witt*, 5 Ch. D. 589, C. A.; *Beynon* v. *Godden*, 4 Ex. D. 246, C. A.

15. No appeal from any interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year. The said respective periods shall be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal. Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal. **R. 15.** Time to appeal. Interlocutory order. Other appeals. Security for costs.

An appeal is brought in time within the meaning of this Rule when notice of appeal is served within the times specified; and the fact that the offices are closed so that the appeal cannot be entered, does not extend the time for serving the notice: *Ex parte Saffery*, 5 Ch. D. 365, C. A.

A double distinction is drawn in this rule, in regulating the time for appeal: first, between interlocutory and other appeals; secondly, between the making and the refusal of an order or judgment. As to what is an interlocutory order and what a final order, see s. 12 of the Act of 1875, *ante*, p. 106. As to the time to appeal in bankruptcy, winding up, and other proceedings not in an action, see r. 9, *ante*. An order is not the less interlocutory, within the meaning of this rule, because it is included in an order on further consideration which is final: *Cummins* v. *Herron*, 4 Ch. D. 787, C. A.; *White* v. *Witt*, 5 Ch. D. 589, C. A. Interlocutory or final.

The second distinction is between an order or judgment granting, and one refusing, an application. In the former case, the time runs from the time when the judgment or order is signed, Grant or refusal.

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entered or otherwise perfected. Thus, from an order in bankruptcy, the time now runs from the signing, not the pronouncing of the order: *Ex parte Garrard*, 5 Ch. D. 61, C. A.; *Ex parte Saffery*, *ibid.*, 365, C. A.

Grant or refusal.

On the other hand, an appeal from the refusal of an application runs from the actual refusal, not from the drawing up or perfecting of the judgment or order. See the reason of this distinction discussed by Mellish, L. J., in *Swindell* v. *Birmingham Syndicate*, 3 Ch. D. at p. 133, C. A. As to when a judgment subject to an account being taken is perfected, see *Gathercole* v. *Smith*, W. N. 1880, p. 102. The dismissal of a suit at the hearing is a refusal of an application within the meaning of this rule: *International Financial Society* v. *City of Moscow Gas Co.*, 7 Ch. D. 241, C. A. Where of several claims some are allowed and some refused, the time runs in the case of those refused from the actual refusal: *Trail* v. *Jackson*, 4 Ch. D. 7, C. A.; *Berdan* v. *Birmingham Small Arms Co.*, 7 Ch. D. 24, C. A. The refusal must be a simple and unqualified refusal in order that time may run therefrom. An order refusing an application, but containing also a direction as to costs, is a simple refusal: *Swindell* v. *Birmingham Syndicate*, 3 Ch. D. 127, C. A.; see too *Re Claggett*, 20 Ch. D. 134, C. A.; but an order directing payment out of Court to a petitioner of one half of a fund, when he had asked for the whole, is not: *Re Mitchell*, 9 Ch. D. 5, C. A.; nor is an order which in addition to refusing an application contains a declaration as to the rights of the parties: *Re Clay and Tetley*, 16 Ch. D. 3, C. A. Where an order made in Chancery chambers is re-heard in Court under s. 50 of the Act of 1873, and the judge refuses the application to vary the order made in chambers, the time runs from the refusal in Court: *Dickson* v. *Harrison*, 9 Ch. D. 243, C. A. See, too, *Heatley* v. *Newton*, 19 Ch. D. 326, C. A.

Extension of time.

The point down to which the time is reckoned is the service of notice of appeal: *Ex parte Viney*, 4 Ch. D. 794, C. A. But the appeal must also be entered in due time, under r. 8, *ante*, p. 425.

An application for an extension of time will not be heard ex parte: *Re Lawrence*, *Evennett* v. *Lawrence*, 4 Ch. D. 139, C. A.

A mistake of law as to the time to appeal, arising from a misconstruction of the rules, is no ground for extending the time. That is only done if the appellant has been misled by the other side, or in case of unavoidable accident: *International Financial Society* v. *City of Moscow Gas Co.*, 7 Ch. D. 241, C. A.; *Highton* v. *Treherne*, 48 L. J. Ex. 167, C. A.; *McAndrew* v. *Barker*, 7 Ch. D. 701, C. A.; as explained in *Re Blyth*, 13 Ch. D., at p. 240; *Rhodes* v. *Jenkins*, 7 Ch. D. 711 C. A. See, too, *Ex parte Ward*, 15 Ch. D. 292, C. A. The fact that a decision of the Court of Appeal has thrown doubt on the correctness of the decision of the High Court in another case which was not appealed from, is no ground for extending the time in that case: *Craig* v. *Phillips*, 7 Ch. D. 249, C. A. Where an appellant withdrew a valid notice of appeal, thinking it informal, and the next day served a second notice, and the objection was taken that the second notice was too late, the Court enlarged the time: *Taylor's Case*, 8 Ch. D. 643, C. A. Where a third party appealed from an adjudication of bankruptcy which injuriously affected him, after the expiration of the proper time, but as soon as he was aware of the facts, the time was extended: *Ex p. Tucker*, 12 Ch. D. 308, C. A. See a discussion as to the principles on which the discretion to extend the time should be exercised in *Collins* v. *Paddington Vestry*, 5 Q. B. D. 368, C. A. Compare the power under this rule with the general power to extend time given under O. LVII., r. 6, *ante*, pp. 413, 414.

It will be observed, that under this rule there is no provision for any security for costs of appeal, unless the Court of Appeal orders it by reason of special circumstances. On the other hand, by the next rule, an appeal is no stay of proceedings or of execution, unless either the court below or the Court of Appeal so orders.

Security for costs.

An application for security for costs is by motion on notice; no leave to set down the motion is necessary: *Grills* v. *Dillon*, 2 Ch. D. 325, C. A.

The insolvency of the appellant is a special circumstance within the meaning of this rule, and *primâ facie* constitutes a sufficient reason for ordering him to give security for costs: see per Cotton, L. J., in *Re Ivory*, 10 Ch. D. 372, at p. 377, C. A.; see in illustration where security has been ordered: *Wilson* v. *Smith*, 2 Ch. D. 67, C. A.; *Unil* v. *Brearley*, 3 C. P. D. 206, C. A.; *Waddell* v. *Blockey*, 10 Ch. D. 416, C. A. In *Rourke* v. *White Moss Colliery Co.*, 1 C. P. D. 556, C. A., however, where the issue involved a question of law which had not before been considered by an appellate Court, the Court refused to order an insolvent appellant to give security; but see *Harlock* v. *Ashberry*, 19 Ch. D. 84, C. A., where it was stated that extreme poverty was of itself a sufficient ground for ordering security. Where an order absolute for winding up a company has been made, and the company alone appeals from the order without joining any one personally responsible for costs, security will be ordered: *Re Diamond Fuel Co.*, 13 Ch. D. 400, at p. 412. See too *Northampton Coal Co.* v. *Midland Waggon Co.*, 7 Ch. D. 500, C. A. In an ordinary action the fact that the appellant is a foreigner resident abroad with no assets in this country is a special circumstance within the rule: *Grant* v. *Banque Franco-Egyptienne*, 2 C. P. D. 430, C. A. See further *Clarke* v. *Roche*, 45 L. J. Ch. 372, C. A., as to an appeal from an order refusing a mandamus against a County Court judge; and *Wilson* v. *Church*, 11 Ch. D., at p. 578, C. A., where a stay of proceedings had been granted.

The defendant in an action *in rem* who appeals, will not, without special circumstances, be ordered to give security: *The Victoria*, 1 P. D. 280, C. A.

After the costs of appeal have been incurred by the respondent, it is too late to ask for security: *Grant* v. *Banque Franco-Egyptienne*, 1 C. P. D. 143, C. A. See too *Re Musical Compositions*, W. N., 1879, p. 99, C. A.; and *Re Corporation of Saltash*, 43 L. T. 464, C. A., as to unreasonable delay in applying for security.

Where it is clear that there is a right to security, application should first be made to the party, and a reasonable offer of security should be accepted. The Court, in dealing with the costs of an application for security, will consider the conduct of the parties in this respect: *The Constantine*, 4 P. D. 156, C. A.

Security may be ordered either by deposit or by bond with surety: *Phosphate Sewage Co.* v. *Hartmont*, 2 Ch. D. 811, C. A.

In a bankruptcy appeal the Court of Appeal has power to increase the amount of deposit beyond the maximum authorised by rule 145 of the Bankruptcy Rules, 1870: *Ex parte Isaacs*, 9 Ch. D. 271, C. A.

Where security is ordered to be given it is not the practice to fix a time for giving it; but the order must be complied with within a reasonable time, otherwise the appeal will be dismissed: *Polini* v. *Gray*, 11 Ch. D. 741 C. A.; explaining *Re Ivory*, 10 Ch. D. 372, C. A., where an appeal was dismissed after failure for

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two months only to give security. Each case must be judged on its own merits: see further *Judd* v. *Green*, 4 Ch. D. 784, C. A.; and *Vale* v. *Oppert*, 5 Ch. D. 633, C. A.

As to effect of order of dismissal, and for the form of order, see *Harris* v. *Fleming*, 30 W. R. 555, C. A.

R. 16. Stay of proceedings.

16. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any judge thereof, or the Court of Appeal, may so order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct.

As to stay of execution in a judgment for money or costs, see O. XLII., r. 15, *ante*, p. 367.

Where a stay of proceedings is not granted when judgment is given, a substantive application for an order to stay may be made. The application must be made in the first instance to the Court below: see rule 17, and *Attorney-General* v. *Swansea Improvement Co.*, 9 Ch. D. 46, C. A. The application must be made on notice, not *ex parte*: *Republic of Peru* v. *Waguelin*, 24 W. R. 297; *Emma Mining Co.* v. *Lewis*, 48 L. J. Q. B. 504, C. A. In the Queen's Bench Division it is made to a master at chambers: *Goddard* v. *Thompson*, 47 L. J. Q. B. 382, C. A. The costs of the application are usually borne by the applicant: *Cooper* v. *Cooper*, 2 Ch. D. 492, C. A.; but the Court has a discretion, and in a proper case will depart from the rule: see *Adair* v. *Young*, 11 Ch. D. 136, C. A., where the costs were made costs in the cause. An appeal from an order to stay of proceedings need not be set down on the list of appeals: *Attorney-General* v. *Swansea Improvements Co.*, 9 Ch. D. at p. 47, C. A.

As to when, and the terms on which proceedings will be stayed pending an appeal, see *Vale* v. *Oppert*, 5 Ch. D. 969, C. A.; *Adair* v. *Young*, 11 Ch. D. 136, C. A.

Where an action has been dismissed, there can, strictly speaking, be no stay of proceedings: for the Court of First Instance, being *functus officio*, can do nothing. In such case an application may be made at once to the Court of Appeal, which in a proper case will grant an injunction to keep things *in statu quo* pending an appeal: *Wilson* v. *Church*, 11 Ch. D. 576, C. A.; but mere proceedings for costs may, it seems, be stayed by the Court below: *Otto* v. *Linford*, 30 W. R. 418, C. A.

House of Lords Appeals.

Application for a stay of proceedings pending an appeal to the House of Lords must be made to the Court of Appeal: *The Khedive*, 5 P. D. 1, C. A.

As to when, and on what terms, proceedings will be stayed in the case of an appeal to the House of Lords, see *Grant* v. *Banque Franco-Egyptienne*, 3 C. P. D. 202, C. A.: *Morgan* v. *Elford*, 4 Ch. D. 352, C. A.: *Wilson* v. *Church*, 12 Ch. D. 454, C. A.; *Polini* v. *Gray*, 12 Ch. D. 439, C. A., continuation of injunction pending appeal.

R. 17. Application: when it may be made to either Court.

17. Wherever under these Rules an application may be made either to the Court below or to the Court of Appeal, or to a judge of the Court below or of the Court of Appeal, it shall be made in the first instance to the Court or judge below.

R. 18. Application to a judge of the Court of Appeal.

18. Every application to a judge of the Court of

Appeal shall be by motion, and the provisions of Order LIII. shall apply thereto. Order LVIII.

R. 19. 19. Every judge of the High Court of Justice for the time being shall be a judge to hear and determine appeals from Inferior Courts, under section 45 of the Supreme Court of Judicature Act, 1873. All such appeals (except Admiralty appeals from Inferior Courts, which until further order shall be assigned as heretofore to the present judge of the Admiralty Court) shall be entered in one list by the officers of the Crown Office of the Queen's Bench Division, and shall be heard by such Divisional Court of the Queen's Bench, Common Pleas, or Exchequer Division, as the Presidents of those Divisions shall from time to time direct. Appeals from inferior courts. (R. S. C., Dec. 1875, r. 11.)

Nothing in this Order shall affect the validity of any Rule or regulation heretofore issued with reference to such appeals by the Divisional Court formed under the said section.

See as to these appeals, s. 45 of the Act of 1873, *ante*, p. 55, and note thereto.

ORDER LIX. Order LIX.

Effect of Non-Compliance.

Non-compliance with rules. 1. Non-compliance with any of these Rules shall not render the proceedings in any action void unless the Court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or judge shall think fit.

Where an irregularity has been committed, and the opposite party afterwards takes some step in the action, he does not, it seems, thereby necessarily waive the irregularity: see *Pilcher* v. *Hinds*, 11 Ch. D. 905, C. A.

Amendment. (R. S. C., April, 1880, r. 44.) 2. The Court or a judge may at any time, and on such terms as to costs or otherwise as to the Court or judge may seem just, amend any defect or error in any proceedings, and all such amendments may be made as may be necessary for the purpose of determining the real question or issue raised by or depending on the proceedings.

This rule in effect reproduces s. 122 of the C. L. P. Act, 1852. As to amending clerical errors or slips in judgments, see O. XLI. A, *ante*, p. 362, and note thereto.

Order LX.

ORDER LX.

OFFICERS.

R. 1. Officers of Divisions.

1. All officers who at the time of the commencement of the said Act shall be attached to the Court of Chancery shall be attached to the Chancery Division of the said High Court; and all officers who at the time of the commencement of the said Act shall be attached to the Court of Queen's Bench shall be attached to the Queen's Bench Division of the said High Court; and all officers who at the time of the commencement of the said Act shall be attached to the Court of Common Pleas, shall be attached to the Common Pleas Division of the said High Court; and all officers who at the time of the commencement of the said Act shall be attached to the Court of Exchequer shall be attached to the Exchequer Division of the said High Court; and all officers who at the time of the commencement of the said Act shall be attached to the Court of Probate, the Court of Divorce, and the Court of Admiralty respectively shall be attached to the Probate, Divorce, and Admiralty Division of the said High Court.

R. 2. Appeals.

2. Officers attached to any Division shall follow the appeals from the same Division, and shall perform in the Court of Appeal analogous duties in reference to such appeals as the registrars and officers of the Court of Chancery usually performed as to rehearings in the Court of Appeal in Chancery, and as the masters and officers of the Courts of Queen's Bench, Common Pleas, and Exchequer respectively performed as to appeals heard by the Court of Exchequer Chamber.

See also as to officers and offices, Part V. of the Act of 1873, *ante*, pp. 75, *et seq.*; and the definition of "proper officer" in O. LXIII., *post*, p. 444.

R. 3. Abolished offices. Masters of Supreme Court. (R. S. C., Dec. 1879, r. 6.)

3. The office of Master of the Supreme Court of Judicature shall be deemed to be substituted for the several offices specified in the first part of the first schedule to the Supreme Court of Judicature (Officers) Act, 1879, and all enactments and documents referring to any of those offices, or to any of the persons holding them, shall, unless the context otherwise requires, be construed and have effect accordingly.

ORDER LXa.

Order LXa.

Central Office.

1. The central office shall, for the convenient despatch of business, be divided into the departments specified in the first column of the following scheme, and the business and staff of the office shall be distributed among the departments in accordance with that scheme.

R. 1. Departments of central office. (R. S. C., Dec. 1879, r. 7.)

Scheme.

Name of Department.	Business.	Staff.
1. Writ, appearance, and judgment.	The sealing and issue of writs of summons for the commencement of actions. The entry in the cause book of writs of summons, appearances, and judgments. The sealing and issue of notices for service under Order XVI., Rule 18. The receipt and filing of pleadings delivered on entry of judgment. The transaction of all business heretofore conducted in the Record and Writ Office, except such part thereof as is transacted in the Record department.	The clerks employed in similar duties in the Record and Writ Office. Such of the clerks employed in the issue of writs and the entry of appearances and judgments in the Master's offices of the Queen's Bench, Common Pleas, and Exchequer Divisions as may be selected by the Masters for the purpose. And such of the officers employed under the registrars of the Probate, Divorce, and Admiralty Divisions as are selected for transfer to the central office.
2. Summons and Order.	The issue of summonses in the Queen's Bench, Common Pleas, and Exchequer Divisions, and the drawing up of all Orders made either in Court or in Chambers in those divisions.	The clerks employed in the Rule offices, and such of the other clerks in the Master's offices of the Queen's Bench, Common Pleas, and Exchequer Divisions as may be selected by the Masters for the purpose. And such additional clerks as may be appointed from time to time for the purpose.

Order LXa. r. 1.	Name of Department.	Business.	Staff.
	3. Filing and Record.	The filing of all affidavits to be filed in the Central Office, and all depositions to be used in the Chancery Division, and such other documents as may from time to time be directed by the Masters to be filed, and the making and examination of office copies of documents filed in the department. The custody of all deeds and documents ordered to be left with the Masters. The business heretofore performed in the Report Office under the direction and control of the Clerks of Records and Writs.	The clerks and writers employed in similar duties in the Record and Writ Office with such additional clerks and such writers and messengers as may be from time to time found necessary.
	4. Taxing.	The taxation of costs in the Queen's Bench, Common Pleas, and Exchequer Divisions, except such costs as have heretofore been taxed in the Queen's Remembrancer's Office or the Crown Office.	Such of the clerks in the Master's offices of these three divisions as may be selected by the Masters for the purpose.
	5. Enrolment.	The business heretofore performed in the Enrolment Office.	The clerks of the Enrolment Office.
	6. Judgments.	The registry of judgments, execution, &c.	The clerks employed in similar duties under the registrar of judgments.
	7. Bills of Sale.	The registry of bills of sale and other duties connected therewith.	The clerks employed in similar duties under the Masters of the Queen's Bench Division as registrars of bills of sale.

Name of Department.	Business.	Staff.
8. Married Women's acknowledgments.	The registry of acknowledgments of deeds by married women.	The clerks employed in similar duties under the registrar of acknowledgments of deeds by married women.
9. Queen's Remembrancer.	The business heretofore performed in the Queen's Remembrancer's Office.	The clerks of the Queen's Remembrancer's Office.
10. Crown Office.	The business heretofore performed in the Crown Office.	The clerks of the Crown Office.
11. Associates.	The business heretofore performed in the Associates' Offices.	The clerks of the three Associates.

As to the constitution of the Central Office, see ss. 4 to 14 of the Act of 1879, *ante*, p. 144.

R. 2. Practice master. (R. S. C., Dec. 1879, r. 8.)

2. It shall be the special duty of one of the Masters to be present at, and control the business of, the central office, and he shall give the necessary directions with respect to questions of practice and procedure relating to the business of the central office. The Masters shall select five of their number to discharge this duty in turn, according to a rota to be fixed by themselves.

R. 3. Taxing-masters vacation. (R. S. C., Dec. 1879, r. 9.)

3. A sufficient number of Masters, not being less than three, shall, except in vacation, attend each day at the Central Office to tax costs. In vacation one Master shall so attend. The taxing Masters shall be selected according to a rota to be fixed by the Masters.

R. 4. Oaths. (R. S. C., Dec. 1879, r. 10.)

4. Every Master, and every first and second-class clerk in the Filing and Record Department, shall, by virtue of his office, have authority to take oaths and affidavits in the Supreme Court.

R. 5. Seals of Central Office. (R. S. C., April, 1880, r. 45.)

5. The official seals to be used in the Central Office shall be such as the Lord Chancellor from time to time directs.

All copies, certificates, and other documents appearing to be sealed with a seal of the Central Office shall be presumed to be office copies or certificates or other documents issued from the Central Office, and if duly stamped may

Order LXa. rr. 5—8a.

be received in evidence, and no signature or other formality, except the sealing with a seal of the Central Office, shall be required for the authentication of any such copy, certificate, or other document.

R. 6. Enrolment of deeds.

6. All deeds which by any statute or statutory rule are directed or permitted to be enrolled in any of the courts whose jurisdiction has been transferred to the High Court of Justice may be enrolled in the Enrolment Department of the Central Office.

R. 7. Judgments, &c., not to be registered after 2 p.m.

7. The Registrar of Judgments shall not receive any memorandum of a judgment, execution, lis pendens, order, rule, annuity, Crown debt, or other incumbrance, or any memorandum of satisfaction relating to the same, for registration, after the hour of two in the afternoon.

R. 8. *Searches and certificates of search.*

8 *The Clerk of Enrolments and each of the following Registrars, namely—*

The Registrar of Bills of Sale,

The Registrar of Certificates of Acknowledgments of Deeds by Married Women, and

The Registrar of Judgments

shall, on a request in writing giving sufficient particulars, and on payment of the prescribed fee, cause a search to be made in the registers or indexes under his custody, and issue a certificate of the result of the search.

A person shall not inspect nor take any extract from any of these registers or indexes, or any document filed in connection therewith, until he has specified in writing to the officer in charge of the register or index the name against which he wishes to search, and has satisfied the officer as to the object of the search.

R. 8a. Searches. (R. S. C., May, 1880, r. 5.)

8a. Order LX*a*, Rule 8, is hereby annulled, and the following shall stand in lieu thereof :

The Clerk of Enrolments and each of the following Registrars, namely—

The Registrar of Bills of Sale,

The Registrar of Certificates of Acknowledgments of Deeds by Married Women, and

The Registrar of Judgments,

shall, on a request in writing giving sufficient particulars, and on payment of the prescribed fee, cause a search to be made in the registers or indexes under his custody, and issue a certificate of the result of the search.

Order LXa. rr. 9—12.

9. The Masters shall be the Registrar for the purposes of the Bills of Sale Act, 1878, and any one of the Masters may perform all or any of the duties of the Registrar.

R. 9.

Registrars under Bills of Sale Act. (R. S. C., April, 1880, r. 49.)

10. A memorandum of satisfaction may be ordered to be written upon a registered copy of a bill of sale on a consent to the satisfaction, signed by the person entitled to the benefit of the bill of sale, and verified by affidavit, being produced to the Registrar, and filed in the Central Office.

R. 10.

Memorandum of satisfaction of bill of sale. (R. S. C., April, 1880, r. 50.)

Where this consent cannot be obtained the Registrar may, on application by summons, and on hearing the person entitled to the benefit of the bill of sale, or on affidavit of service of the summons on that person, and in either case on proof to the satisfaction of the Registrar that the debt (if any) for which the bill of sale was made has been satisfied or discharged, order a memorandum of satisfaction to be written upon a registered copy thereof.

R. 11.

Restrictions on removal of documents from Central Office. (R. S. C., April, 1880, r. 51.)

11. No affidavit or record of the Court shall be taken out of the Central Office without the order of a judge or Master, and no subpœna for the production of any such document shall be issued.

As to filing affidavits in the Central Office, see O. XXXVII. r. 3d, *ante*, p. 344.

R. 12.

Forms. (R. S. C., April, 1880, r. 52.)

12. Such variations shall be made in the forms prescribed by or under the Supreme Court of Judicature Acts, 1873, 1875, and 1877 as are requisite for giving effect to these Rules.

The additional forms contained in the schedule hereto shall be used in or for the purposes of the Central Office, with such variations as circumstances require.

The Masters may from time to time prescribe the use in or for the purpose of the Central Office of such modified or additional forms as may be deemed expedient.

See the practice Rules drawn up by the masters for the Central Office, *post*, p. 702.

ORDER LXI.

Order LXI.

SITTINGS AND VACATIONS.

R. 1.

Sittings.

1. The sittings of the Court of Appeal and the sittings in London and Middlesex of the High Court of Justice shall be four in every year, viz., the Michaelmas sittings, the Hilary sittings, the Easter sittings, and the Trinity sittings.

Order LXI. r. 1.

Michaelmas, Hilary, Easter, Trinity.

The Michaelmas sittings shall commence on the 2nd of November and terminate on the 21st of December; the Hilary sittings shall commence on the 11th of January and terminate on the Wednesday before Easter; the Easter sittings shall commence on the Tuesday after Easter week and terminate on the Friday before Whit Sunday.

The Trinity sittings shall commence on the Tuesday after Whitsun week and terminate on the 8th of August.

By the Act of 1873 :—

Abolition of terms.

[S. 26. The division of the legal year into terms shall be abolished so far as relates to the administration of justice; and there shall no longer be terms applicable to any sitting or business of the High Court of Justice, or of the Court of Appeal, or of any Commissioners to whom any jurisdiction may be assigned under this Act; but in all other cases in which, under the law now existing, the terms into which the legal year is divided are used as a measure for determining the time at or within which any act is required to be done, the same may continue to be referred to for the same or the like purpose, unless and until provision is otherwise made by any lawful authority. Subject to Rules of Court, the High Court of Justice and the Court of Appeal, and the judges thereof respectively, or any such Commissioners as aforesaid, shall have power to sit and act, at any time, and at any place, for the transaction of any part of the business of such Courts respectively, or of such judges or Commissioners, or for the discharge of any duty which by any Act of Parliament, or otherwise, is required to be discharged during or after term.]

Commissions of Assize.

[S. 29. Her Majesty, by commission of assize or by any other commission, either general or special, may assign to any judge or judges of the High Court of Justice or other persons usually named in commissions of assize, the duty of trying and determining within any place or district specially fixed for that purpose by such commission, any causes or matters, or any questions or issues of fact or of law, or partly of fact and partly of law, in any cause or matter depending in the said High Court, or the exercise of any civil or criminal jurisdiction capable of being exercised by the said High Court; and any commission so granted by Her Majesty shall be of the same validity as if it were enacted in the body

of this Act; and any Commissioner or Commissioners appointed in pursuance of this section shall, when engaged in the exercise of any jurisdiction assigned to him or them in pursuance of this Act, be deemed to constitute a Court of the said High Court of Justice; and, subject to any restrictions or conditions imposed by Rules of Court and to the power of transfer, any party to any cause or matter involving the trial of a question or issue of fact, or partly of fact and partly of law, may, with the leave of the judge or judges to whom or to whose division the cause or matter is assigned, require the question or issue to be tried and determined by a Commissioner or Commissioners as aforesaid, or at sittings to be held in Middlesex or London as hereinafter in this Act mentioned, and such question or issue shall be tried and determined accordingly. A cause or matter not involving any question or issue of fact, may be tried and determined in like manner with the consent of all the parties thereto.]

Continuous sittings in London.

[S. 30. Subject to Rules of Court, sittings for the trial by jury of causes and questions or issues of fact shall be held in Middlesex and London, and such sittings shall, so far as is reasonably practicable, and subject to vacations, be held continuously throughout the year by as many judges as the business to be disposed of may render necessary. Any judge of the High Court of Justice sitting for the trial of causes and issues in Middlesex or London, at any place heretofore accustomed, or to be hereafter determined by Rules of Court, shall be deemed to constitute a Court of the said High Court of Justice.]

R. 2. Vacations:

2. The vacations to be observed in the several courts and offices of the Supreme Court shall be four in every year, viz., the Long vacation, the Christmas vacation, the Easter vacation, and the Whitsun vacation.

Long Vacation,

The Long vacation shall commence on the 10th of August and terminate on the 24th of October. The

Christmas,

Christmas vacation shall commence on the 24th of December and terminate on the 6th of January.

Easter,

The Easter vacation shall commence on Good Friday and terminate on Easter Tuesday; and the Whitsun

Whitsun.

vacation shall commence on the Saturday before Whit Sunday and shall terminate on the Tuesday after Whit Sunday.

By the Act of 1873 :—

Vacations.

[S. 27. Her Majesty in Council may from time to time, upon any report or recommendation of the judges by whose advice Her Majesty is hereinafter authorised to make rules before the commencement of this Act, and after the commencement of this Act upon any report or recommendation of the Council of Judges of the Supreme Court hereinafter mentioned, with the consent of the Lord Chancellor, make, revoke, or modify, orders regulating the vacations to be observed by the High Court of Justice and the High Court of Appeal, and in the offices of the said Courts respectively; and any Order in Council made pursuant to this section shall, so long as it continues in force, be of the same effect as if it were contained in this Act; and Rules of Court may be made for carrying the same into effect in the same manner as if such Order in Council were part of this Act. In the meantime, and subject thereto, the said vacations shall be fixed in the same manner, and by the same authority, as if this Act had not passed. This section shall come into operation immediately upon the passing of this Act.]

R. 3.

Days of commencement and conclusion.

3. The days of the commencement and termination of each sitting and vacation shall be included in such sitting and vacation respectively.

R. 4.

Offices: when open.

4. The several offices of the Supreme Court shall be open on every day of the year, except Sundays, Good Friday, Monday and Tuesday in Easter week, Whit Monday, Christmas Day, and the next following working day, and all days appointed by proclamation to be observed as days of general fast, humiliation, or thanksgiving.

R. 4a.

District Registries.

(R. S. C., Dec. 1875, r. 15.)

4a. The offices of each District Registrar of the High Court of Justice shall be open on every day and hour in the year on which the offices of the Registrar of the County Court of the place in which the District Registry is situate are required to be kept open.

R. 4b.

Hours on Saturdays.

(R. S. C., Feb. 1876, r. 9.)

4b. The offices of the Supreme Court (including the judges' chambers) shall close on Saturdays at 2 o'clock.

R. 4c.

ours.

4c. The office hours in the several offices of the Supreme Court, other than the Summons and Order, Crown Office, and Associates Departments of the Central

Order LXI. rr. 4c—5.

Office, shall be from ten in the forenoon to four in the afternoon, except on Saturday and in vacation, when the offices shall close at two in the afternoon. In the excepted departments the hours shall be from eleven in the forenoon to five in the afternoon, except on Saturday and in vacation, when the hours shall be from eleven in the forenoon to three in the afternoon.

(R. S. C., April, 1880, r. 53.)

R. 4d. Whitsun vacation in Manchester District Registry.

4d. The office of the District Registry at Manchester shall not be open in any year on the five days next following Whit Monday.

(R. S. C., May, 1880, r. 5.)

R. 5. Vacation judges.

5. Two of the judges of the High Court shall be selected at the commencement of each long vacation for the hearing in London or Middlesex during vacation of all such applications as may require to be immediately or promptly heard. Such two judges shall act as vacation judges for one year from their appointment. In the absence of arrangement between the judges, the two vacation judges shall be the two judges last appointed (whether as judges of the said High Court or of any Court whose jurisdiction is by the said Act transferred to the said High Court) who have not already served as vacation judges of any such Court, and if there shall not be two judges for the time being of the said High Court who shall not have so served, then the two vacation judges shall be the judge (if any) who has not so served and the senior judge or judges who has or have so served once only according to seniority of appointment, whether in the said High Court or such other Court as aforesaid. The Lord Chancellor shall not be liable to serve as a vacation judge.

By the Act of 1873 :—

[S. 28. Provision shall be made by Rules of Court for the hearing, in London or Middlesex, during vacation by judges of the High Court of Justice and the Court of Appeal respectively, of all such applications as may require to be immediately or promptly heard.]

No provision, it will be observed, is made for the attendance of vacation judges of the Court of Appeal.

No business is heard by the vacation judges, or any other judges sitting for them under the next rule, except such as requires to be immediately or promptly heard within the meaning of the above section. No judges except the vacation judges, or those sitting for them, can dispose of business in vacation : Per Lush and Lopes, JJ., 24th Sept. 1877.

Order LXI. rr. 5—8.

An application for judgment under O. XIV., *ante*, p. 222, will be heard as urgent if the right to make it has accrued in vacation, not otherwise: *Ibid.*

R. 6. Sitting of vacation judges.

6. The vacation judges may sit either separately or together as a Divisional Court as occasion shall require, and may hear and dispose of all actions, matters, and other business to whichever Division the same may be assigned. No order made by a vacation judge shall be reversed or varied except by a Divisional Court or the Court of Appeal, or a judge thereof, or the judge who made the order. Any other judge of the High Court may sit in vacation for any vacation judge.

R. 7. Business in vacation.

7. The vacation judges of the High Court may dispose of all actions, matters, and other business of an urgent nature during any interval between the sittings of any Division of the High Court to which such business may be assigned, although such interval may not be called or known as a vacation.

R. 8. Official referees. (R. S. C., Feb. 1876, r. 10.)

8. The Official Referees shall sit at least from 10 a.m. to 4 p.m. on every day during the Michelmas, Hilary, Easter, and Trinity sittings of the High Court of Justice, except on Saturdays, during such sittings, when they shall sit, at least, from 10 a.m. to 2 p.m.; but nothing in this Rule shall prevent their sitting on any other days.

Order LXII.

ORDER LXII.

EXCEPTIONS FROM THE RULES.

Nothing in these Rules shall affect the practice or procedure in any of the following causes or matters:—

Criminal proceedings:

Proceedings on the Crown side of the Queen's Bench Division:

Proceedings on the Revenue side of the Exchequer Division:

Proceedings for divorce or other matrimonial causes.

See s. 21 of the Act of 1875, *ante*, p. 112.

R. 1. Proceedings

1. Order LXII is hereby annulled, and the following shall stand in lieu thereof.

Order LXII. rr. 1—5.

Subject to the provisions of this Order, nothing in these Rules shall affect the procedure or practice in any of the following causes or matters:—

1. Criminal proceedings.
2. Proceedings on the Crown side of the Queen's Bench Division.
3. Proceedings on the Revenue side of the Exchequer Division.
4. Proceedings for Divorce or other Matrimonial Causes.

excepted from Rules. (R. S. C., April, 1880, r. 54.)

R. 2. Application of certain rules to excepted proceedings. (R. S. C., April, 1880, r. 55.)

2. The following Rules of the Supreme Court shall, as far as they are applicable, apply to all civil proceedings on the Crown side of the Queen's Bench Division, and to all proceedings on the Revenue side of the Exchequer Division; namely,—

Order LV. (Costs).
Order LVI. (Notices and papers, &c.)
Order LVII. (Time).
Order LVIII. (Appeals).

R. 3. Special case. (R. S. C., April, 1880, r. 56.)

3. The parties to any civil proceeding on the Crown side of the Queen's Bench Division, or to any proceeding on the Revenue side of the Exchequer Division, may, at any time after the proceeding is commenced, concur in stating any question or questions of law arising in the proceeding in the form of a special case for the opinion of the Court, and the provisions of Order XXXIV. shall, as far as they are applicable, apply to any special case so stated, as if it had been stated in an action.

This rule does not apply to cases stated under the Taxes Management Act, 1880, such cases being stated by commissioners, not by the parties.

R. 4. Amendment. (R. S. C., April, 1880, r. 57.)

4. The Court or a judge may at any time, and on such terms as to costs or otherwise as to the Court or judge may seem just, amend any defect or error in any civil proceeding on the Crown side of the Queen's Bench Division, or in any proceeding on the Revenue side of the Exchequer Division, and all such amendments may be made as may be necessary for the purpose of determining the real question or issue raised by or depending on the proceeding.

R. 5. Non-compliance with Rules. (R. S. C., April, 1880, r. 58.)

5. Non-compliance with any rule of practice or procedure for the time being in force with respect to civil proceedings on the Crown side of the Queen's Bench Division, or to proceedings on the Revenue side of the

Exchequer Division, shall not render the proceedings void unless the Court or a judge so direct, but the proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and on such terms as the Court or judge may think fit.

R. 6.

Mandamus, Quo Warranto, and Prohibition to be deemed civil proceedings. (R. S. C., April, 1880, r. 59.)

6. For the purposes of this Order, proceedings in Mandamus, Quo Warranto, and Prohibition shall be deemed civil proceedings.

By s. 6 of the Statute Law Revision and Civil Procedure Act, 1881 (44 & 45 Vict. c. 59) :—

The enactments relating to the making of rules of court contained in the Supreme Court of Judicature Act, 1875, and the Acts amending it, shall extend and apply to . . . all proceedings by or against the Crown.

Where a case is stated by sessions upon appeal against a poor rate, the proceeding is a civil proceeding, and the costs of it are accordingly in the discretion of the Court by virtue of the application of O. LV. : *Clark* v. *Fisherton Angar*, 6 Q. B. D. 139 ; but a case stated upon appeal against a summary conviction by justices under the Weights and Measures Acts is not a civil proceeding for this purpose : *Reg.* v. *Baxendale*, 6 Q. B. D. 144, n.

In *Reg.* v. *Collins*, 2 Q. B. D. 30, C. A., before these new rules a Quo Warranto information was by consent tried by a judge without a jury, and an appeal from his judgment was entertained as if it were an ordinary civil case.

ORDER LXIII.

Interpretation of Terms.

R. 1.

Interpretation.

1. The provisions of the 100th section of the Act shall apply to these Rules.

In the construction of these Rules, unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned or referred to shall have or include the meanings following :—

"Person" shall include a body corporate or politic :

"Probate actions" shall include actions and other matters relating to the grant or recall of probate or of letters of administration other than common form business :

"Proper officer" shall unless and until any rule to the contrary is made, mean an officer to be ascertained as follows :—

(*a.*) Where any duty to be discharged under the Act or these Rules is a duty which has heretofore been discharged by any officer, such officer shall continue to be the proper officer to discharge the same:

(*b.*) Where any new duty is under the Act or these Rules to be discharged, the proper officer to discharge the same shall be such officer, having previously discharged analogous duties, as may from time to time be directed to discharge the same, in the case of an officer of the Supreme Court, or the High Court of Justice, or the Court of Appeal, not attached to any Division, by the Lord Chancellor, and in the case of an officer attached to any Division, by the President of the Division, and in the case of an officer attached to any judge, by such judge:

"The Act" and "the said Act" shall respectively mean the Supreme Court of Judicature Act, 1873, as amended by this Act.

See s. 100 of the Act of 1873, *ante*, p. 92.
As to officers, see ss. 77 to 87 of the Act of 1873, *ante*, pp. 75 to 88; and O. LX., *ante*, p. 433.

R. 2. Interpretation of terms. (R. S. C., April, 1880, r. 60.)

2. In these Rules the expression "Central Office" means the Central Office of the Supreme Court of Judicature; and the expression "Master" means a Master of the Supreme Court of Judicature.

In the Supreme Court of Judicature (Officers) Act, 1879, and in Order LX., the expression "Officer of the Supreme Court" shall mean any officer paid wholly or partly out of public money who is attached to the Supreme Court, the High Court of Justice, or the Court of Appeal, or to any judge of any of those Courts, and is not an officer attached to the person of a judge, and removable by him at pleasure.

The term "these Rules" as used in the Rules of the Supreme Court shall include any Rules made in amendment of or addition to those Rules.

Order LXIV.

ORDER LXIV.

SCHEME UNDER RAILWAY COMPANIES ACT, 1867.

R. 1. Annulling of certain rules as to enrolment of scheme under 30 & 31 Vict. c. 127.

1. Rules 21 to 28, both inclusive, of the Order of Court made under the Railway Companies Act, 1867, are hereby annulled.

R. 2. Mode of enrolment of scheme.

2. A scheme under the Railway Companies Act, 1867, shall be enrolled in the Enrolment Department of the Central Office.

R. 3. Conditions of enrolment of scheme. (R. S. C., April, 1880, rr. 61—63.)

3. A scheme under that Act shall not be enrolled unless notice of the order confirming it has at least once in every entire week, reckoned from Sunday morning to Saturday evening, which elapses between the pronouncing of the order and the expiration of 30 days from the pronouncing thereof, been inserted in such two newspapers as shall have been appointed by the judge for the insertion of advertisements under the order made pursuant to that Act, nor unless the newspapers containing those notices are produced to the proper officer when the scheme is presented for enrolment.

APPENDICES TO THE FOREGOING RULES.

FORMS.

[By s. 100 of the Act of 1873, *ante*, p. 92. Rules of Court shall include forms.

By O. LX.A., r. 12 (April, 1880), *ante*, p. 437, which prescribed a quantity of new forms, "such variations shall be made in the forms prescribed by or under the Supreme Court of Judicature Acts, 1873, 1875, and 1877, as are requisite for giving effect to these Rules.

"The additional forms contained in the schedule hereto" (in this edition inserted in their appropriate places) "shall be used in or for the purposes of the Central Office with such variations as circumstances require.

"The Masters may from time to time prescribe the use in or for the purpose of the Central Office of such modified or additional forms as may be deemed expedient."]

APPENDIX (A).

Act 1875, Appx. A. Pt. I. No. 1.

PART I.

FORMS OF WRITS OF SUMMONS, &c.

No. 1.

General form of writ of summons.

187 . [*Here put the letter and number.*]
In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D. and *E. F.*, Defendants.

VICTORIA, by the grace of God, *&c.*

To *C. D.*, of in the county of and *E. F.*, of

We command you, That within eight days after the service of this writ on you, inclusive of the day of such service, you do

Act 1875, Appx. A. Pt. I. No. 1.

cause an appearance to be entered for you in the Division of Our High Court of Justice in an action at the suit of *A. B.*; and take notice, that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness, *&c.*

Memorandum to be subscribed on the writ:—

N.B.—This writ is to be served within (*twelve*) calendar months from the date thereof, or, if renewed, from the date of such renewal, including the day of such date, and not afterwards.

The defendant [*or* defendants] may appear hereto by entering an appearance [*or* appearances] either personally or by solicitor at the [ ] office at .

Indorsements to be made on the writ before issue thereof:—

The plaintiff's claim is for, *&c.*

This writ was issued by *E. F.*, of , solicitor for the said plaintiff, who resides at . *or*, This writ was issued by the plaintiff in person, who resides at [*mention the city, town, or parish, and also the name of the street and number of the house of the plaintiff's residence, if any*].

Indorsement to be made on the writ after service thereof:—

This writ was served by *X. Y.* on *L. M.* the defendant [*or*, one of the defendants], on *Monday*, the day of , 18 .

(Signed) *X. Y.*

This form is prescribed by O. II., r. 3, *ante*, p. 184.

As to the costs of more prolix or other forms than those prescribed, see *Ibid.*, r. 2.

As to commencing an action by writ of summons, see O. II., r. 1, *ante*, p. 183. See also O. III., r. 6, *ante*, p. 188, as to specially indorsed writs. As to Admiralty actions, see O. II., r. 7a, *ante*, p. 186; and *post*, p. 458, No. 4a.

As to the date of the year, letter, and number, see O. V., r. 8, *ante*, p. 195.

As to the choice of a division, see s. 11 of the Act of 1875, *ante*, p. 104. As to marking the name of a particular judge in actions assigned to the Chancery Division, see ss. 33 and 42 of the Act of 1873, *ante*, pp. 46, 53; and the name of the District Registry, when action commenced there, see O. V., r. 8, *ante*, p. 194.

As to notice to the proper officer of the choice of a division, see s. 11 of the Act of 1875, *ante*, p. 104, and O. V., r, 9, *ante*, p. 195.

As regards the title of administration actions in the Chancery division, the following notice was issued in February, 1876, by the Record and Writ Clerks:—"Considerable confusion having arisen in actions for administration of an estate from the practice of adding after the issue of the writ a title, 'In the matter of the estate,' &c., solicitors are requested, in all actions for administration, to intitule the writ in the following form:—'In the matter of the estate, &c.—Between *C. D.*, plaintiff, and *E. F.*, defendant.' It will thus be possible to index these actions in the cause-book under the name of the estate to be administered."

As to the description of parties, when suing or sued in a representative capacity, see O. III., rr. 4, 5, *ante*, pp. 187, 188.

As to the parties to actions, see O. XVI., *ante*, pp. 226, *et seq.*, and notes thereto. As to actions by or against partners or firms, see *Ibid.*, rr. 10, 10a, *ante*, p. 232. **Act 1875, Appx. A. Pt. I. Nos. 1, 1a.**

As to the date and teste of the writ, see O. II., r. 8, *ante*, p. 186.

With respect to the memorandum to be subscribed on the writ, as the writ is now in force for twelve months from its date without renewal, and may be renewed for six months, and so from time to time during the currency of the renewed writ. (see O. VIII., r. 1, *ante*, p. 199), the words "within six calendar months" should be inserted after the word "renewed" in the memorandum; and in practice the memorandum is so corrected.

As to the place of appearing, see O. V., rr. 2, 3, *ante*, p. 193; O. XII., *ante*, pp. 210, *et seq.*; and notes thereto; and see *post*, p. 460, No. 6.

As to the indorsements of the plaintiff's claim, see O. II., r. 1, *ante*, p. 183; O. III., *ante*, p. 186, *et seq.*; and notes thereto.

As to the indorsement of the address of plaintiff and his solicitor, see O. IV., *ante*, pp. 189 to 191; and as to the disclosure by solicitors and plaintiffs, see O. VIII., *ante*, p. 199.

As to the preparation and issuing of the writ, see O. V., *ante*, p. 191, *et seq.*, and notes thereto.

As to service generally, see O. IX., *ante*, p. 200; and as to substituted service, O. X., *ante*, p. 206.

As to the indorsement of the service, see O. IX., r. 13, *ante*, p. 206.

As to service abroad, see O. XI., *ante*, p. 206, *et seq.*; Forms 2 and 3, *infra*; and notes thereto.

As to concurrent writs, see O. VI., *ante*, p. 197.

As to the renewal of writs, see O. VIII., *ante*, p. 199; and *post*, p. 460, No. 5.

No. 1a.

Specially indorsed writ, order III., rule 6.

18 . No. .

In the High Court of Justice.
Division,

Between , Plaintiff,
and
, Defendant.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith,

To of, in the of .

We command you, that within eight days after the service of this writ on you, inclusive of the day of such service, you cause an appearance to be entered for you in an action at the suit of ; and take notice, that in default of your so doing, the plaintiff may proceed therein, and judgment may be given in your absence. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of , in the year of our Lord, one thousand eight hundred and .

N.B.—This writ is to be served within twelve calendar months from the date thereof; or, if renewed, within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

Act 1875, Appx. A. Pt. I. Nos. 1a, 1b.

Appearance is to be entered at the Central Office, Royal Courts of Justice, London.

The plaintiff's claim is .

The following are the particulars :—

And the sum of £ , [*or* such sum as may be allowed on taxation] for costs. If the amount claimed is paid to the plaintiff, or his solicitor or agent within four days from the service hereof, further proceedings will be stayed.

This writ was issued by , of , whose address for service is , agent for , of , solicitor for the said plaintiff , who reside at .

This writ was served by me at , on the defendant, on , the day of , 18 .

Indorsed the day of , 18 .

(Signed)
(Address)

No. 1b.

Writ for issue from district registry.

18 . No. .

In the High Court of Justice
Division.

(MANCHESTER) DISTRICT REGISTRY.

Between , Plaintiff,
and
, Defendant.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith,

To of, in the of .

We command you, that within eight days after the service of this writ on you, inclusive of the day of such service, you cause an appearance to be entered for you in an action at the suit of ; and take notice, that in default of your so doing, the plaintiff may proceed therein, and judgment may be given in your absence. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of , in the year of our Lord one thousand eight hundred and .

N.B.—This writ is to be served within twelve calendar months from the date thereof, or, if renewed, within six calendar months from the date of the last renewal, and not afterwards.

A defendant who resides or carries on business within the above-named district must enter appearance at the office of the registrar of that district. [*Insert address of office.*]

A defendant who neither resides nor carries on business within the said district, may enter appearance either at the office of the said registrar, or at the Central Office, Royal Courts of Justice, London.

The plaintiff's claim is .

This writ was issued by , whose address for service [*this address must be within the district*] is agent for , of , solicitor for the said plaintiff, who resides at .

Act 1875, Appx. A. Pt. I. Nos. 1b, 1c.

This writ was served by me at , on the defendant on day, the day of , 18 .

Indorsed the day of , 18.

(Signed)
(Address)

No. 1c.

18 . No. .

Specially indorsed writ for issue from district registry.

In the High Court of Justice.
Division.

(MANCHESTER) DISTRICT REGISTRY.

Between , Plaintiff.
and
, Defendant.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith,

To of, in the of .

We command you, that within eight days after the service of this writ on you, inclusive of the day of such service, you cause an appearance to be entered for you in an action at the suit of ; and take notice, that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of , in the year of our Lord one thousand eight hundred and .

N.B.—This writ is to be served within twelve calendar months from the date thereof, or if renewed, within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

A defendant who resides or carries on business within the above-named district must enter appearance at the office of the registrar of that district. [*Insert address of office.*]

A defendant who neither resides nor carries on business within the said district may enter appearance either at the office of the said registrar, or at the Central Office, Royal Courts of Justice, London.

The plaintiff's claim is .

The following are the particulars:—

And the sum of £ [*or* such sum as may be allowed on taxation], for costs. If the amount claimed is paid to the plaintiff, or his solicitor or agent within four days from the service hereof, further proceedings will be stayed.

This writ was issued by , of , whose address for service [*this address must be within the district*] is

Act 1875, Appx. A. Pt. I. Nos. 1c, 2, 2a.

agent for , of , solicitor for the said plaintiff, who reside at .

This writ was served by me at , on the defendant on the day of , 18 .

Indorsed the day of , 18 .

(Signed)
(Address)

Writ for service out of the jurisdiction, or where notice in lieu of service is to be given out of the jurisdiction.

No. 2.

187. [*Here put the letter and number.*]

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., and *E. F.*, Defendants.

VICTORIA, by the grace of God, &c.

To *C. D.*, of

We command you, *C. D.*, That within [*here insert the number of days directed by the Court or Judge ordering the service or notice*] after the service of this writ [*or*, notice of this writ, *as the case may be*] on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Division of Our High Court of Justice in an action at the suit of *A. B.*; and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness, &c.

Memorandum and Indorsements as in Form No. 1.

Indorsement to be made on the writ before the issue thereof:—

N.B.—This writ is to be used where the defendant or all the defendants or one or more defendant or defendants is or are out of the jurisdiction.

This and form 3 are prescribed by O. II., r. 5, *ante*, p. 185.

O. II., r. 3a, *ante*, p. 185, altered forms 2 and 3 by striking out the words "by leave of the Court or a Judge" which were improperly therein.

As to service out of the jurisdiction of the writ or notice, see O. XI., *ante*, p. 206, *et seq.*, and notes thereto.

And see notes to form 1, *supra*.

Specially indorsed writ for service out of the jurisdiction.

No. 2a.

18 . No. .

In the High Court of Justice.
Division.

Between , Plaintiff,
and
, Defendant.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith,

To of, in the of .

We command you, that within [*insert number of days directed*

by Court or Judge] days after service [*if notice of the writ is to be served, insert here* "*of notice*"] of this writ on you, inclusive of the day of such service, you cause an appearance to be entered for you in an action at the suit of ; and take notice, that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of , in the year of our Lord one thousand eight hundred and .

N.B.—This writ is to be served within twelve calendar months from the date thereof, or if renewed, within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

Appearance is to be entered at the Central Office, Royal Courts of Justice, London.

The plaintiff's claim is .

The following are the particulars:—

And £ [*or* such sum as may be allowed on taxation for costs. If the amount claimed is paid to the plaintiff or h solicitor or agent within [*insert number of days limited for appearance*] days from service [*if notice to be served, insert here* "*of notice*"] hereof, further proceedings will be stayed; and take notice, that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of , in the year of our Lord one thousand eight hundred and .

N.B.—This writ is to be served within twelve calendar months from the date thereof, or if renewed, within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

A defendant who resides or carries on business within the above-named district, must enter appearance at the office of the registrar of that district. [*Insert address of office.*]

A defendant who neither resides nor carries on business within the said district may enter appearance either at the office of the said registrar or at the Central Office, Royal Courts of Justice, London.

The plaintiff's claim is .

This writ was issued by , of , whose address for service [*this address must be within the district*] is agent for , solicitor for the said plaintiff who reside at .

This writ [*or* notice of this writ] was served by me at , on the defendant , on the day of , 18 .

Indorsed the day of , 18 .

(Signed)
(Address)

N.B—This writ is to be used where the defendant, or all the defendants, or one or more defendant or defendants, is or are out of the jurisdiction. Where the defendant to be served is not a British subject, and is not in British dominions, notice of the writ and not the writ itself is to be served upon him.

Act 1875, Appx. A. Pt. I. No. 2b.

No. 2b.

18 . No. .

In the High Court of Justice.
Division.

Writ from district registry for service out of the jurisdiction.

(MANCHESTER) DISTRICT REGISTRY.

Between , Plaintiff,
and
, Defendant.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith,

To of

We command you, that within [*insert number of days directed by Court or Judge*] days after the service of [*If notice of writ is to be served, insert here "notice of"*] this writ on you, inclusive of the day of such service, you cause an appearance to be entered for you in an action at the suit of ; and take notice, that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of , in the year of our Lord one thousand eight hundred and . .

N.B.—This writ is to be served within twelve calendar months from the date thereof, or if renewed, within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

A defendant who resides or carries on business within the above-named district must enter appearance at the office of the registrar of that district. [*Insert address of office.*]

A defendant who neither resides nor carries on business within the said district may enter appearance either at the office of the said registrar, or at the Central Office, Royal Courts of Justice, London.

The plaintiff's claim is .

This writ was issued by , of , whose address for service [*this address must be within the district*] , agent for , solicitor for the said plaintiff who reside at .

This writ [*or* notice of this writ] was served by me at , on the defendant , on , the day of 18 .

Indorsed the day of , 18 .

(Signed)
(Address)

N.B.—This writ is to be used where the defendant, or all the defendants, or one or more defendant or defendants, is or are out of the jurisdiction. Where the defendant to be served is not a British subject, and is not in British dominions, notice f the writ and not the writ itself is to be served upon him.

No. 2c.

Act 1875, Appx. A. Pt. I. No. 2c.

18 . No. .

In the High Court of Justice, Division.

(MANCHESTER) DISTRICT REGISTRY.

Specially indorsed writ from district registry for service out of the jurisdiction.

Between , Plaintiff,
and
Defendants.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith,

To , of , in the of ,

We command you, that within [*insert number of days directed by Court or Judge*] days after service of [*if notice of writ is to be served, insert here "notice of"*] this writ on you, inclusive of the day of such service, you cause an appearance to be entered for you in an action at the suit of ; and take notice, that in default of your so doing, the plaintiff may proceed therein, and judgment may be given in your absence. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of , in the year of our Lord one thousand eight hundred and .

N.B.—This writ is to be served within twelve calendar months from the date thereof, or if renewed, within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

A defendant who resides or carries on business within the above-named district must enter appearance at the office of the registrar of that district [*insert address of office*].

A defendant who neither resides nor carries on business within the said district may enter appearance either at the office of the said registrar or at the Central Office, Royal Courts of Justice, London.

The plaintiff's claim is

The following are the particulars:—

And £ [*or* such sum as may be allowed on taxation], for costs. If the amount claimed be paid to the plaintiff or h solicitor or agent within [*insert number of days limited for appearance*] days from service [*if notice of writ is to be served, insert here "of notice"*] hereof, further proceedings will be stayed.

This writ was issued by , of , whose address for service [*this address must be within the district*] is , agent for , of , solicitor for the said plaintiff , who reside at .

This writ [*or* notice of this writ] was served by me at , on the defendant , on , the day of , 18 .

Indorsed the day of , 18 .

(Signed)
(Address)

Act 1875, Appx. A. Pt. I. Nos. 3, 3a.

N.B.—This writ is to be used where the defendant or all the defendants, or one or more defendant or defendants, is or are out of the jurisdiction. Where the person to be served is not a British subject, and is not in British dominions, notice of the writ and not the writ itself to be served upon him.

See Form No. 3.

No. 3.

Notice of writ in lieu of service to be given out of the jurisdiction.

187 . [*Here put the letter and number.*]

Between *A. B.*, Plaintiff,
and
C. D., *E. F.*, and *G. H.*, Defendants.

To *G. H.*, of

Take notice that *A. B.*, of has commenced an action against you, *G. H.*, in the Division of Her Majesty's High Court of Justice in England, by writ of that Court, dated the day of , A.D. 18 ; which writ is indorsed as follows [*copy in full the indorsements*], and you are required within days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the said Court to the said action; and in default of your so doing, the said *A. B.* may proceed therein, and judgment may be given in your absence.

You may appear to the said writ by entering an appearance personally or by your solicitor at the [ ] office at

(Signed) *A. B.*, of &c.
or
X. Y., of &c.
Solicitor for *A. B.*

In the High Court of Justice.
Division.

See notes to Form No. 2, *supra*, p. 452. This form is to be used when the person to be served is not a British subject, and is not in British dominions.

No. 3a.

Notice of writ in lieu of service to be given out of the jurisdiction.

(District Registry Form.)

18 . No. .

In the High Court of Justice.
Division.

(Manchester) District Registry.

Between , Plaintiff,
and
Defendant.

To , of .

Take notice, that , of , ha commenced an action against you , in the Division of Her Majesty's High Court of Justice in England, by writ of that Court, dated the day of 18 , which writ is indorsed as follows:— ; and take notice, that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness, Hugh

MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, this day of , in the year of Our Lord One thousand eight hundred and . Act 1875, Appx. A. Pt. I. Nos. 3a, 4.

N.B.—This writ is to be served within twelve calendar months from the date thereof, or if renewed, within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

A defendant who resides or carries on business within the above-named district must enter appearance at the office of the registrar of that district. [*Insert address of office.*]

A defendant who neither resides nor carries on business within the said district may enter appearance either at the office of the said registrar or at the Central Office, Royal Courts of Justice, London.

The plaintiff's claim is for

This writ was issued by of , whose address for service [*This address must be within the district*] is , agent for , of , solicitor for the said plaintiff , who reside at .

This writ was served by me [*State mode of service*], on , the day of , 18 .

Indorsed the day of , 18 .

(Signed)
(Address)

No. 4.

187 . [*Here put the letter and number.*] Writ in admiralty action in rem.

In the High Court of Justice.
Admiralty Division.

Between A. B., Plaintiff,
and
Owners.

Victoria, &c.

To the owners and parties interested in the ship or vessel [*Mary*] [*or cargo, &c., as the case may be*] *of the port of*

We hereby authorize Officer of our Supreme Court, and all and singular his substitutes, to arrest the ship or vessel [*Mary*], *of the port of and the cargo laden therein* [*or cargo, &c., as the case may be*], *and to keep the same under safe arrest until he shall receive further orders from Us. And We command you, the owners and other parties interested in the said ship and cargo* [*or cargo, &c., as the case may be*] *that within eight days after the arrest of the said vessel* [*or cargo, &c., as the case may be*] *you do cause an appearance to be entered for you in the Admiralty Division of our High Court of Justice in an action at the suit of A. B.; and take notice that in default of your so doing, Our said Court will proceed to hear the said action and to pronounce judgment therein, your absence notwithstanding.*

The above form was prescribed by O. II. r. 7, *ante*, p. 186, but

Act 1875, Appx. A. Pt. I. Nos. 4, 4a.

by O. II., r. 7a, and O. V., r. 11a, *ante*, pp. 186, 196, the following forms, 4a and 4b, are substituted :—

No. 4a.

Writ of summons in admiralty action *in rem*.

187 . [*Here put the letter and number.*]

In the High Court of Justice.
Admiralty Division.

Between *A. B.*, Plaintiff,
and
The owners of the

VICTORIA, by the Grace of God, &c.
To the owners and parties interested in the ship or vessel of the port of [*or* cargo, *&c., as the case may be*].

We command you, that within eight days after the service of this writ, inclusive of the day of such service, you do cause an appearance to be entered for you in the Admiralty Division of our High Court of Justice in an action at the suit of *A. B.*; and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness, Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain, this day of , 18 .

Memorandum to be subscribed on the Writ.

N.B.—This writ is to be served within (*twelve*) calendar months from the date thereof, or, if renewed, from the date of such renewal, including the day of such date, and not afterwards.

The defendant [*or* defendants] may appear hereto by entering an appearance [or appearances] either personally or by solicitor at the [ ] office at

Indorsement to be made on the Writ before Issue thereof.

The plaintiff's claim is for, &c.

This writ was issued by *E. F.*, of , solicitor for the said plaintiff, who resides at . *or*, This writ was issued by the plaintiff in person, who resides at [*mention the city, town, or parish, and also the name of the street and number of the house of the plaintiff's residence, if any.*]

Indorsement to be made on the Writ after Service thereof.

This writ was served by *X. Y.* [*here state the mode in which the service was effected, whether on the owner, or on the ship, cargo, or freight, according to Order IX., Rules* 10, 11, *and* 12, *as the case may be*] on , the day of , 18 .

Signed,
X. Y.

Act 1875, Appx. A. Pt. I. No. 4b.

No. 4b. (1).

Writ in admiralty actions for issue from district registry.

In the High Court of Justice.
Division, 18 , No. .
(MANCHESTER) DISTRICT REGISTRY.

Between , Plaintiff,
and
The Owners of the
Defendants.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the owners and parties interested in the ship or vessel , of the port of , and

We command you, that within eight days after the service of this writ, inclusive of the day of such service, you cause an appearance to be entered for you in an action at the suit of . And take notice, that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, this day of , in the year of Our Lord One thousand eight hundred and .

N.B.—This writ is to be served within twelve calendar months from the date thereof, or if renewed, within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

A defendant who resides or carries on business within the above-named district must enter appearance at the office of the registrar of that district. [*Insert address of office.*]

A defendant who neither resides nor carries on business within the said district may enter appearance either at the office of the said registrar or at the Central Office, Royal Courts of Justice, London.

The plaintiff's claim is for

This writ was issued by , of , whose address for service [*This address must be within the district*] is , agent for , of , solicitor for the said plaintiff , who reside at .

This writ was served by me [*State mode of service*], on , the day of , 18 .

Indorsed the day of , 18 .

(Signed)
(Address)

Act 1875, Appx. A. Pt. I. No. 4b—6.

No. 4b. (2).

187 . [*Here put the letter and number.*]

Warrant of arrest in admiralty action in *rem*.

In the High Court of Justice.
Admiralty Division.

Between *A. B.*, Plaintiff,
and
The Owners of the
Defendants.

VICTORIA, &c.

To the marshal of the Admiralty Division of our High Court of Justice, and to all and singular his substitutes [*or*, To the collector or collectors of customs at the port of]. We hereby command you to arrest the ship or vessel , of the port of [and the cargo and freight, *&c.*, *as the case may be*], and to keep the same under safe arrest, until you shall receive further orders from us. Witness, Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain, this day , 18 .

As to writs of summons generally, see notes to Form 1, *ante*, p. 448.

As to service of a writ in an Admiralty action *in rem*, see O. IX., rr. 10a, 11, 12, *ante*, pp. 205, 206, and notes thereto. As to the warrant of arrest, see O. V., r. 11a, *ante*, p. 196.

No. 5.

Form of memorandum for renewed writ.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Seal renewed writ of summons in this action indorsed as follows :—

[*Copy original writ and the indorsements.*]

This form is prescribed by O. VIII., r. 1, *ante*, p. 199.

As to the renewal of writs, see O. VIII., *ante*, pp. 199 to 200, and notes thereto.

No. 6.

Memorandum of appearance.

187 . [*Here put the letter and number.*]

High Court of Justice.
[*Chancery*] Division.
A. B. v. *C. D.*, and others.

Enter an appearance for
in this action.
Dated this day of

X. Y.,
Solicitor for the Defendant.

The place of business of *X. Y.* is
His address for service is

Or [*C. D.*,
Defendant in person.
The address of *C. D.* is
His address for service is .]

Act 1875, Appx. A. Pt. I. Nos. 6, 7.

The said defendant [requires, *or*, does not require] a statement of complaint to be filed and delivered.

This form is prescribed by O. XII., r. 10, *ante*, p. 213.

As to appearance generally, see O. V., rr. 2, 3, *ante*, p. 193, and O. XII., *ante*, p. 210, *et seq.*; and notes thereto.

As to the contents of the memorandum of appearance, see O. XII., rr. 7, 8, *ante*, pp. 212, 213.

As to waiving a statement of claim, see O. XIX., r. 2, *ante*, p. 248.

No. 7.

[*Here put the letter and number.*]

Limited appearance in action for land.

In the High Court of Justice.
Queen's Bench [*or* Chancery, C. P., *or*, &c.] Division.

Between *A. B.*, Plaintiff,
and
C. D., and *E. F.* Defendants.

The defendant *C. D.* limits his defence to part only of the property mentioned in the writ in this action, that is to say, to the close called "the Big field."

Yours, &c.,
G. H.,
Solicitor for the said defendant *C. D.*

To Mr. *X. Y.*, plaintiff's solicitor.

This form is prescribed by O. XII., r. 22, *ante*, p. 215.

As to limiting the defence in an action for the recovery of land, see *Ibid.*, r. 21, *ante*, p. 215.

Act 1875, Appx. A. Pt. II. s. 1.

PART II.

SECTION I.

GENERAL INDORSEMENTS,

IN MATTERS ASSIGNED BY THE 34TH SECTION OF THE ACT [OF 1873] TO THE CHANCERY DIVISION.

1.

Creditor to administer estate.

The plaintiff's claim is as a creditor of *X. Y.*, of deceased, to have the [real and] personal estate of the said *X. Y.* administered. The defendant *C. D.* is sued as the administrator of the said *X. Y.* [and the defendants *E. F.* and *G. H.* as his co-heirs-at-law].

See *re Royles*, 5 Ch. D. 540; and *In re Vincent*, 26 W. R. 94.

2.

Legatee to administer estate.

The plaintiff's claim is as a legatee under the will dated the day of 18 , of *X. Y.* deceased, to have the [real and] personal estate of the said *X. Y.* administered. The defendant *C. D.* is sued as the executor of the said *X. Y.* [and the defendants *E. F.* and *G. H.* as his devisees.

3.

Partnership.

The plaintiff's claim is to have an account taken of the partnership dealings between the plaintiff and defendant [under articles of partnership dated the day of], and to have the affairs of the partnership wound up.

4.

By mortgagee.

The plaintiff's claim is to have an account taken of what is due to him for principal, interest, and costs on a mortgage dated the day of made between [*or* by deposit of title deeds], and that the mortgage may be enforced by foreclosure or sale.

5.

By mortgagor.

The plaintiff's claim is to have an account taken of what, if any thing, is due on a mortgage dated and made between [*parties*], and to redeem the property comprised therein.

6.

Raising portions.

The plaintiff's claim is that the sum of *l.*, which by an indenture of settlement dated , was provided for the portions of the younger children of , may be raised.

7.

Execution of Trusts.

The plaintiff's claim is to have the trusts of an indenture dated and made between , carried into execution.

8. Act 1875, Appx. A. Pt. II. ss. 1, 2.

The plaintiff's claim is to have a deed dated and made between [*parties*], set aside or rectified.

9. Cancellation or rectification.

The plaintiff's claim is for specific performance of an agreement dated the day of , for the sale by the plaintiff to the defendant of certain [freehold] hereditaments at . Specific performance.

As to indorsements of the plaintiff's claim, see O. III., *ante*, p. 186, *et seq.* and notes thereto.

SECTION II. (*a*).

Money Claims where no Special Indorsement under Order III., Rule 6.

1. The plaintiff's claim is *l.* for the price of goods sold. Goods sold.

[*This Form shall suffice whether the claim be in respect of goods sold and delivered, or of goods bargained and sold.*]

2. The plaintiff's claim is *l.* for money lent [and interest]. Money lent.

3. The plaintiff's claim is *l.* whereof *l.* is for the of goods sold, and *l.* for money lent, and *l.* for interest. Several demands.

4. The plaintiff's claim is *l.* for arrears of rent. Rent.

5. The plaintiff's claim is *l.* for arrears of salary as a clerk [*or as the case may be.*] Salary, &c.

6. The plaintiff's claim is *l.* for interest upon money lent. Interest.

7. The plaintiff's claim is *l.* for a general average contribution. General average.

8. The plaintiff's claim is *l.* for freight and demurrage. Freight, &c.

9. The plaintiff's claim is *l.* for lighterage. Lighterage.

10. The plaintiff's claim is *l.* for market tolls and stallage. Tolls.

11. The plaintiff's claim is *l.* for penalties under the Statute [. . . .]. Penalties.

12. The plaintiff's claim is the defendant as a banker. *l.* for money deposited with Banker's balance.

13. The plaintiff's claim is *l.* for fees for work done [and *l.* money expended] as a solicitor. Fees, &c. as solicitors.

14. The plaintiff's claim is *l.* for commission earned as [*state character, as* auctioneer, cotton broker, *&c.*]. Commission.

(*a*) The forms in this section are not numbered in the schedule to the Act of 1875.

Act 1875, Appx. A. Pt. II. s. 2.

Medical attendance, &c.
15. The plaintiff's claim is *l.* for medical attendances.

Return of premium.
16. The plaintiff's claim is *l.* for a return of premiums paid upon policies of insurance.

17. The plaintiff's claim is *l.* for the warehousing of goods.

Warehouse rent.
18. The plaintiff's claim is *l.* for the carriage of goods by railway.

Carriage of goods.
19. The plaintiff's claim is *l.* for the use and occupation of a house.

Use and occupation of houses.
20. The plaintiff's claim is *l.* for the hire of [furniture].

Hire of goods.
21. The plaintiff's claim is *l.* for work done as a surveyor.

Work done.
22. The plaintiff's claim is *l.* for board and lodging.

Board and lodging.
23. The plaintiff's claim is *l.* for the board, lodging, and tuition of *X. Y.*

Schooling.
Money received.
24. The plaintiff's claim is *l.* for money received by the defendant as solicitor [*or* factor, *or* collector, *or*, &c.] of the plaintiff.

Fees of office.
25. The plaintiff's claim is *l.* for fees received by the defendant under colour of the office of .

Money overpaid.
26. The plaintiff's claim is *l.* for a return of money overcharged for the carriage of goods by railway.

Overcharge.
27. The plaintiff's claim is *l.* for a return of fees overcharged by the defendant as . .

Return of money by stakeholder.
28. The plaintiff's claim is *l.* for a return of money deposited with the defendant as stakeholder.

Money won from stakeholder.
29. The plaintiff's claim is *l.* for money entrusted to the defendant as stakeholder, and become payable to plaintiff.

Money entrusted to agent.
30. The plaintiff's claim is *l.* for a return of money entrusted to the defendant as agent of the plaintiff.

Money obtained by fraud.
31. The plaintiff's claim is *l.* for a return of money obtained from the plaintiff by fraud.

Money paid by mistake.
32. The plaintiff's claim is *l.* for a return of money paid to the defendant by mistake.

Money paid for consideration which has failed.
33. The plaintiff's claim is *l.* for a return of money paid to the defendant for [work to be done, left undone; *or*, a bill to be taken up; not taken up, &c.]

34. The plaintiff's claim is *l.* for a return of money paid as a deposit upon shares to be allotted.

Money paid by surety for defendant.
35. The plaintiff's claim is *l.* for money paid for the defendant as his surety.

Rent paid.
36. The plaintiff's claim is *l.* for money paid for rent due by the defendant.

Money paid on accommodation bill.
37. The plaintiff's claim is *l.* upon a bill of exchange accepted [*or* indorsed] for the defendant's accommodation.

38. The plaintiff's claim is *l.* for a contribution in respect of money paid by the plaintiff as surety. — Act 1875, Appx. A. Pt. II. ss. 2, 3.

39. The plaintiff's claim is *l.* for a contribution in respect of a joint debt of the plaintiff and the defendant, paid by the plaintiff. — Contribution by surety.

40. The plaintiff's claim is *l.* for money paid for calls upon shares, against which the defendant was bound to indemnify the plaintiff. — By co-debtor.

41. The plaintiff's claim is *l.* for money payable under an award. — Money paid for calls.

42. The plaintiff's claim is *l.* upon a policy of insurance upon the life of *X. Y.*, deceased. — Money payable under an award. Life policy.

43. The plaintiff's claim is *l.* upon a bond to secure payment of 1,000*l.*, and interest. — Money bond.

44. The plaintiff's claim is *l.* upon a judgment of the Court, in the Empire of Russia. — Foreign judgment.

45. The plaintiff's claim is *l.* upon a cheque drawn by the defendant. — Bills of exchange, &c

46. The plaintiff's claim is *l.* upon a bill of exchange accepted [*or* drawn, *or* indorsed] by the defendant.

47. The plaintiff's claim is *l.* upon a promissory note made [*or* indorsed] by the defendant.

48. The plaintiff's claim is *l.* against the defendant *A. B.* as acceptor, and against the defendant *C. D.* as drawer [*or* indorser] of a bill of exchange.

49. The plaintiff's claim is *l.* against the defendant as surety for the price of goods sold. — Surety.

50. The plaintiff's claim is *l.* against the defendant *A. B.* as principal, and against the defendant *C. D.* as surety for the price of goods sold [*or* arrears of rent, *or* for money lent, *or* for money received by the defendant *A. B.*, as traveller for the plaintiffs, *or*, *&c.*].

51. The plaintiff's claim is *l.* against the defendant as a *del credere* agent for the price of goods sold [*or* as losses under a policy]. — *Del credere* agent.

52. The plaintiff's claim is *l.* for calls upon shares. — Calls.

53. The plaintiff's claim is *l.* for crops, tillage, manure [*or as may be*] left by the defendant as outgoing tenant of a farm. — Waygoing crops, &c.

SECTION III.

Indorsement for Costs, &c.

Add to the above Forms:—And *l.* for costs; and if the amount claimed be paid to the plaintiff or his solicitor within four days [*or if the writ is to be served out of the jurisdiction, or notice in lieu of service allowed, insert the time for appearance limited by the order*] from the service hereof, further proceedings will be stayed.

As to this indorsement, see O. III., r. 7, *ante*, p. 188.

Act 1875, Appx. A. Part II. s. 4.

SECTION IV. (a).

Damages and other Claims.

Agent, &c. 1. The plaintiff's claim is for damages for breach of a contract to employ the plaintiff as traveller.

2. The plaintiff's claim is for damages for wrongful dismissal from the defendant's employment as traveller [and *l.* for arrears of wages].

3. The plaintiff's claim is for damages for the defendant's wrongfully quitting the plaintiff's employment as manager.

4. The plaintiff's claim is for damages for breach of duty as factor [*or*, *&c.*] of the plaintiff [and *l.* for money received as factor, *&c.*].

Apprentices. 5. The plaintiff's claim is for damages for breach of the terms of a deed of apprenticeship of *X. Y.* to the defendant [*or* plaintiff].

Arbitration. 6. The plaintiff's claim is for damages for non-compliance with the award of *X. Y.*

Assault, &c. 7. The plaintiff's claim is for damages for assault [and false imprisonment, and for malicious prosecution].

By husband and wife. 8. The plaintiff's claim is for damages for assault and false imprisonment of the plaintiff *C. D.*

Against husband and wife. 9. The plaintiff's claim is for damages for assault by the defendant *C. D.*

Solicitor. 10. The plaintiff's claim is for damages for injury by the defendant's negligence as solicitor of the plaintiff.

Bailment. 11. The plaintiff's claim is for damages for negligence in the custody of goods [and for wrongfully detaining the same].

Pledge. 12. The plaintiff's claim is for damages for negligence in the keeping of goods pawned [and for wrongfully detaining the same].

Hire. 13. The plaintiff's claim is for damages for negligence in the custody of furniture lent on hire [*or* a carriage lent], [and for wrongfully, &c.].

Banker. 14. The plaintiff's claim is for damages for wrongfully neglecting [*or* refusing] to pay the plaintiff's cheque.

Bill. 15. The plaintiff's claim is for damages for breach of a contract to accept the plaintiff's drafts.

Bond. 16. The plaintiff's claim is upon a bond conditioned not to carry on the trade of a .

Carrier. 17. The plaintiff's claim is for damages for refusing to carry the plaintiff's goods by railway.

18. The plaintiff's claim is for damages for refusing to carry the plaintiff by railway.

(a) The forms in this section are not numbered in the schedule to the Act of 1875.

19. The plaintiff's claim is for damages for breach of duty in and about the carriage and delivery of coals by railway.

20. The plaintiff's claim is for damages for breach of duty in and about the carriage and delivery of machinery by sea.

21. The plaintiff's claim is for damages for breach of charter-party of ship ["Mary"]. Charter-party.

22. The plaintiff's claim is for return of household furniture, or, &c., or their value, and for damages for detaining the same. Claim for return of goods; damages.

23. The plaintiff's claim is for wrongfully depriving plaintiff of goods, household furniture, &c. Damages for depriving of goods.

24. The plaintiff's claim is for damages for libel.

25. The plaintiff's claim is for damages for slander. Defamation.

26. The plaintiff's claim is in replevin for goods wrongfully distrained. Distress. Replevin.

27. The plaintiff's claim is for damages for improperly distraining. Wrongful distress.

[*This Form shall be sufficient whether the distress complained of be wrongful or excessive, or irregular, and whether the claim be for damages only, or for double value.*]

28. The plaintiff's claim is to recover possession of a house, No. in street. *Or* of a farm called Blackacre, situate in the parish of in the county of . Ejectment.

29. The plaintiff's claim is to establish his title to [*here describe property*], and to recover the rents thereof. To establish title and recover rents.

[*The two previous Forms may be combined.*]

30. The plaintiff's claim is for dower. Dower.

31. The plaintiff's claim is for damages for infringement of the plaintiff's right of fishing. Fishery.

32. The plaintiff's claim is for damages for fraudulent misrepresentation on the sale of a horse [*or* a business, *or* shares, *or*, *&c.*] Fraud.

33. The plaintiff's claim is for damages for fraudulent misrepresentation of the credit of *A. B.*

34. The plaintiff's claim is for damages for breach of a contract of guarantee for *A. B.* Guarantee.

35. The plaintiff's claim is for damages for breach of a contract to indemnify the plaintiff as the defendant's agent to distrain.

36. The plaintiff's claim is for a loss under a policy upon the ship "Royal Charter," and freight or cargo [*or* for return of premiums]. Insurance.

[*This form shall be sufficient whether the loss claimed be total or partial.*]

37. The plaintiff's claim is for a loss under a policy of fire insurance upon house and furniture. Fire insurance.

As to the distinction in practice between the above two claims, see *Gledhill v. Hunter*, M. R. 14 Ch. D. 492.

Act 1875, Appx. A. Pt. II. s. 4.

38. The plaintiff's claim is for damages for breach of a contract to insure a house.

39. The plaintiff's claim is for damages for breach of contract to keep a house in repair.

Landlord and tenant.

40. The plaintiff's claim is for damages for breaches of covenants contained in a lease of a farm.

Medical man.

41. The plaintiff's claim is for damages for injury to the plaintiff from the defendant's negligence as a medical man.

Mischievous animal.

42. The plaintiff's claim is for damages for injury by the defendant's dog.

Negligence.

43. The plaintiff's claim is for damages for injury to the plaintiff [*or, if by husband and wife*, to the plaintiff, C. D.] by the negligent driving of the defendant or his servants.

44. The plaintiff's claim is for damages for injury to the plaintiff while a passenger on the defendant's railway by the negligence of the defendant's servants.

45. The plaintiff's claim is for damages for injury to the plaintiff at the defendant's railway station, from the defective condition of the station.

Lord Campbell's Act.

46. The plaintiff's claim is as executor of *A. B.* deceased, for damages for the death of the said *A. B.*, from injuries received while a passenger on the defendant's railway, by the negligence of the defendant's servants.

Promise of marriage.

47. The plaintiff's claim is for damages for breach of promise of marriage.

Quare impedit.

48. The plaintiff's claim is in *quare impedit* for .

Seduction.

49. The plaintiff's claim is for damages for the seduction of the plaintiff's daughter.

50. The plaintiff's claim is for damages for breach of contract to accept and pay for goods.

Sale of goods.

51. The plaintiff's claim is for damages for non-delivery [*or* short delivery, *or* defective quality, *or other breach of contract of sale*] of cotton [*or, &c.*].

52. The plaintiff's claim is for damages for breach of warranty of a horse.

Sale of land.

53. The plaintiff's claim is for damages for breach of a contract to sell [*or* purchase] land.

54. The plaintiff's claim is for damages for breach of a contract to let [*or* take] a house.

55. The plaintiff's claim is for damages for breach of a contract to sell [*or* purchase] the lease, with goodwill, fixtures, and stock in trade of a public-house.

56. The plaintiff's claim is for damages for breach of covenant for title [*or* for quiet enjoyment, *or*, *&c.*] in a conveyance of land.

Trespass to land.

57. The plaintiff's claim is for damages for wrongfully entering the plaintiff's land and drawing water from his well [*or* cutting his grass, *or* pulling down his timber, *or* pulling down his fences, *or* removing his gate, *or* using his road *or* path, *or* crossing his

field, *or* depositing sand there, *or* carrying away gravel from thence, *or* carrying away stones from his river].

58. The plaintiff's claim is for damages for wrongfully taking away the support of plaintiff's land [*or* house, *or* mine]. Support.

59. The plaintiff's claim is for damages for wrongfully obstructing a way [public highway, *or* a private way]. Way.

60. The plaintiff's claim is for damages for wrongfully diverting [*or* obstructing, *or* polluting, *or* diverting water from] a watercourse. Watercourse, &c.

61. The plaintiff's claim is for damages for wrongfully discharging water upon the plaintiff's land [*or* into the plaintiff's mine].

62. The plaintiff's claim is for damages for wrongfully obstructing the plaintiff's use of a well.

63. The plaintiff's claim is for damages for the infringement of the plaintiff's right of pasture. Pasture.

[*This Form shall be sufficient whatever the nature of the right to pasture be.*]

64. The plaintiff's claim is for damages for obstructing the access of light to plaintiff's house. Light.

65. The plaintiff's claim is for damages for the infringement of the plaintiff's right of sporting. Sporting.

66. The plaintiff's claim is for damages for the infringement of the plaintiff's patent. Patent.

67. The plaintiff's claim is for damages for the infringement of the plaintiff's copyright. Copyright.

68. The plaintiff's claim is for damages for wrongfully using [*or* imitating] the plaintiff's trade mark. Trade mark.

69. The plaintiff's claim is for damages for breach of a contract to build a ship [*or* to repair a house, *&c.*]. Work.

70. The plaintiff's claim is for damages for breach of a contract to employ the plaintiff to build a ship, *&c.*

71. The plaintiff's claim is for damages to his house, trees, crops, *&c.*, caused by noxious vapours from the defendant's factory [*or*, *&c.*]. Nuisance.

72. The plaintiff's claim is for damages from nuisance by noise from the defendant's works [*or* stables, *or*, *&c.*] Nuisance.

73. The plaintiff's claim is for damages for loss of the plaintiff's goods in the defendant's inn. Innkeeper.

74. *Add to Indorsement* :—

And for a mandamus. Mandamus.

75. *Add to Indorsement* :—

And for an injunction. Injunction.

Add to Indorsement where claim is to land, or to establish title, or both :—

76. And for mesne profits. Mesne profits.

77. And for an account of rents or arrears of rent. Arrears of rent.

78. And for breach of covenant for [repairs]. Breach of covenant.

Act 1875, Appx. A. Pt. II. ss. 5, 6.

SECTION V.

PROBATE.

By an executor or legatee propounding a will in solemn form.

1. The plaintiff claims to be executor of the last will dated the day of of *C. W.*, late of gentleman, deceased, who died on the day of , and to have the said will established. This writ is issued against you as one of the next of kin of the said deceased [*or as the case may be*].

By an executor or legatee of a former will, or a next of kin, &c., of the deceased seeking to obtain the revocation of a probate granted in common form.

2. The plaintiff claims to be executor of the last will dated the day of of *C. D.*, late of gentleman, deceased, who died on the day of , and to have the probate of a pretended will of the said deceased, dated the day of revoked. This writ is issued against you as the executor of the said pretended will [*or as the case may be*].

By an executor or legatee of a will when letters of administration have been granted as in an intestacy.

3. The plaintiff claims to be the executor of the last will of *C. D.*, late of gentleman, deceased, who died on the day of , dated the day of .

The plaintiff claims that the grant of letters of administration of the personal estate of the said deceased obtained by you should be revoked, and probate of the said will granted to him.

By a person claiming a grant of administration as a next of kin of the deceased, but whose interest as next of kin is disputed.

4. The plaintiff claims to be the brother and sole next of kin of *C. D.*, of gentleman, deceased, who died on the day of intestate, and to have as such a grant of administration to the personal estate of the said intestate. This writ is issued against you because you have entered a caveat, and have alleged that you are the sole next of kin of the deceased [*or as the case may be*].

As to these indorsements in Probate actions, see O. III., r. 5, *ante*, p. 188.

SECTION VI.

ADMIRALTY.

Damage to vessel by collision.

1. The plaintiffs as owners of the vessel "Mary," of the port of , claim 1000*l.* against the brig or vessel "Jane" for damage occasioned by a collision which took place in the North Sea in the month of May last.

Damage to cargo by collision.

2. The plaintiffs as owners of the cargo laden on board the vessel "Mary," of the port of claim £ against the vessel "Jane," for damage done to the said cargo in a collision in the North Sea in the month of May last.

[*The two previous forms may be combined.*]

3. The plaintiff as owner of goods laden on board the vessel "Mary," on a voyage from Lisbon to England, claims from the owner of the said vessel £ for damage done to the said goods during such voyage. Act 1875, Appx. A. Pt. II. s. 6.

4. The plaintiff as sole owner of the vessel "Mary," of the port of , claims to have possession decreed to him of the said vessel. Damage to cargo otherwise. In causes of possession.

5. The plaintiff claims possession of the vessel "Mary," of the port of , as owner of 48-64th shares of the said vessel against *C. D.*, owner of 16-64th shares of the said vessel.

6. The plaintiff as part owner of the vessel "Mary," claims against *C. D.*, part owner and his shares in the said vessel, £ as part of the earnings of the said vessel due to the plaintiff.

7. The plaintiff as owner of 48-64th shares of the vessel "Mary," of the port of , claims possession of the said brig as against *C. D.*, the master thereof.

8. The plaintiff under a mortgage, dated the day of claims against the vessel "Mary," £ , being the amount of his mortgage thereon, and £ for interest.

9. The plaintiff as assignee of a bottomry bond, dated the day of , and granted by *C. D.*, as master of the vessel "Mary," of the port of , to *A. B.*, at St. Thomas's, in the West Indies, claims £ against the vessel "Mary," and the cargo laden thereon.

10. The plaintiff as owner of 24-64th shares of the vessel "Mary," being dissatisfied with the management of the said vessel by his co-owners, claims that his co-owners shall give him a bond in £ for the value of the plaintiff's said shares in the said vessel. By a part owner of the vessel.

11. The plaintiffs as owners of the derelict vessel "Mary," of the port of , claim to be put in possession of the said vessel and her cargo.

12. The plaintiffs as the owners, masters, and crew of the vessel "Caroline," of the port of , claim the sum of £ for salvage services performed by them to the vessel "Mary," off the Goodwin Sands, on the day of . By salvors.

13. The plaintiffs as owners of the steam-tug "Jane," of the port of , claim £ for towage services performed by the said steam-tug to the vessel "Mary," on the day of . Claim for towage.

14. The plaintiffs as seamen on board the vessel "Mary," claim £ for wages due to them, as follows (1), the mate 30*l.* for two months' wages from the day of . Seamen's wages.

15. The plaintiffs claim £ for necessaries supplied to the vessel "Mary," at the port of Newcastle-on-Tyne, delivered on the day of and the day of . For necessaries.

SECTION VII.

SPECIAL INDORSEMENTS.

Special indorsements under Order III., Rule 6.

1. The plaintiff's claim is for the price of goods sold. The following are the particulars:—

1873—31st December.—

	£	s.	d.
Balance of account for butcher's meat to this date	35	10	0
1874—1st January to 31st March.—Butcher's meat supplied	74	5	0
	109	15	0
1874—1st February.—Paid	45	0	0
Balance due	64	15	0

2. The plaintiff's claim is against the defendant *A. B.* as principal, and against the defendant *C. D.* as surety, for the price of goods sold to *A. B.* The following are the particulars:—

1874.—2nd February. Guarantee by *C. D.* of the price of woollen goods to be supplied to *A. B.*

	£	s.	d.
2nd February—To goods	47	15	0
3rd March—To goods	105	14	0
17th March—To goods	14	12	0
5th April—To goods	34	0	0
	202	1	0

3. The plaintiff's claim is against the defendant, as maker of a promissory note. The following are the particulars:—

Promissory note for 250*l.*, dated 1st January, 1874, made by defendant, payable four months after date.

	£
Principal	250
Interest	

4. The plaintiff's claim is against the defendant *A. B.* as acceptor, and against the defendant *C. D.* as drawer, of a bill of exchange. The following are the particulars:—

Bill of exchange for 500*l.*, dated 1st January, 1874, drawn by defendant *C. D.* upon and accepted by the defendant *A. B.*, payable three months after date.

	£
Principal	500
Interest	

5. The plaintiff's claim is for principal and interest due upon a bond. The following are the particulars:—

Bond dated 1st January, 1873. Condition for payment of 100*l.* on the 26th December, 1873.

	£
Principal due	50
Interest	

6. The plaintiff's claim is for principal and interest due under a covenant. The following are the particulars:— Act 1875, Appx. A. Pt. II. s. 8.

Deed dated , covenant to pay 100*l.* and interest.

	£
Principal due	80
Interest	

SECTION VIII.

Indorsements of Character of Parties.

The plaintiff's claim is as executor [*or* administrator] of *C. D.*, deceased, for, *&c.* Executors

The plaintiff's claim is against the defendant *A. B.*, as executor [*or, &c.*] of *C. D.*, deceased, for, *&c.*

The plaintiff's claim is against the defendant *A. B.*, as executor of *X. Y.*, deceased, and against the defendant *C. D.*, in his personal capacity for, *&c.*

The claim of the plaintiff *C. D.* is as executrix of *X. Y.* deceased, and the claim of the plaintiff, *A. B.* as her husband, for . Husband and wife, executrix.

The claim of the plaintiff is against the defendant *C. D.*, as executrix of , deceased, and against the defendant *A. B.*, as her husband, for .

The plaintiff's claim is as trustee under the bankruptcy of *A. B.* for . Trustee in bankruptcy.

The plaintiff's claim is against the defendant as trustee under the bankruptcy of *A. B.*, for .

The plaintiff's claim is as [*or* The plaintiff's claim is against the defendant as] trustee under the will of *A. B.* [*or* under the settlement upon the marriage of *A. B.* and *X. Y.*, his wife]. Trustees.

The plaintiff's claim is as public officer of the Bank, for . Public officer.

The plaintiff's claim is against the defendant as public officer of the Bank, for .

The plaintiff's claim is against the defendant *A. B.* as principal, and against the defendant *C. D.* as public officer of the Bank, as surety, for .

The plaintiff's claim is against the defendant as heir-at-law of *A. B.*, deceased.

The plaintiff's claim is against the defendant *C. D.* as heir-at-law, and against the defendant *E. F.* as devisee of lands under the will of *A. B.* Heir and devisee.

The plaintiff's claim is as well for the Queen as for himself for . *Qui tam* action.

The forms in Section VIII. are prescribed by O. III. r. 4, *ante*, p. 187. As to describing by indorsement the character in which parties filling a representative capacity sue or are sued, see *Ibid.*; and in probate actions, *Ibid.*, r. 5. And see, as to suits by or against trustees, executors, administrators, married women, and infants, O. XVI., rr. 7, 8, *ante*, p. 230.

Appendix B. No. 1.

APPENDIX (B).

NOTICES, &c.

Form 1.

Notice by defendant to third party.

187 . [*Here put the letter and number.*]
Notice filed , 187 .

In the High Court.
Queen's Bench Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

To Mr. *X. Y.*

Take notice that this action has been brought by the plaintiff, against the defendant [as surety for *M. N.*, upon a bond conditioned for payment of 2000*l.* and interest to the plaintiff.

Contribution.

The defendant claims to be entitled to contribution from you to the extent of one half of any sum which the plaintiff may recover against him on the ground that you are (his co-surety under the said bond, *or*, also surety for the said *M. N.*, in respect of the said matter, under another bond made by you in favour of the said plaintiff, dated the day of , A.D.)].

In demnity.

Or [as acceptor of a bill of exchange for 500*l.* dated the day of , A.D. , drawn by you before [? upon] and accepted by the defendant, and payable three months after date.

The defendant claims to be indemnified by you against liability under the said bill, on the ground that it was accepted for your accommodation.

Or [to recover damages for a breach of a contract for the sale and delivery to the plaintiff of 1000 tons of coal.

The defendant claims to be indemnified by you against liability in respect of the said contract, or any breach thereof, on the ground that it was made by him on your behalf and as your agent.]

And take notice that, if you wish to dispute the plaintiff's claim in this action as against the defendant *C. D.*, you must cause an appearance to be entered for you within eight days after service of this notice.

In default of your so appearing, you will not be entitled in any future proceeding between the defendant *C. D.* and yourself to dispute the validity of the judgment in this action, whether obtained by consent or otherwise.

(Signed) *E. T.*
Or,
X. Y.,
Solicitor for the defendant,
E. T.

Appearance to be entered at .

This form is prescribed by O. XVI., r. 18, *ante*, p. 240. Act 1875, Appx. B. Nos. 1—4.

As to the determination of questions as against third parties, the form and service of notice to them, their appearance thereon, and consequences of default, see O. XVI., rr. 17—21, *ante*, pp. 237 to 241, and notes thereto.

As to the place for entering an appearance, see O. XII., *ante*, pp. 210 to 215, and notes thereto.

FORM 2.

Confession by plaintiff of defence.

187 . [*Here put the letter and number.*]

In the High Court.
Queen's Bench Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

The plaintiff confesses the defence stated in the paragraph of the defendant's statement of defence [*or*, of the defendant's further statement of defence].

This form is prescribed by O. XX., r. 3, *ante*, p. 263.

As to when plaintiff may deliver a confession of defence, see *Ibid.*

FORM 3.

Notice in lieu of statement of claim.

187 . [*Here put the letter and number.*]

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

The particulars of the plaintiff's complaint herein, and of the relief and remedy to which he claims to be entitled, appear by the indorsement upon the writ of summons.

This form is prescribed by O. XXI., r. 4, *ante*, p. 266.

As to when it may be used, see *Ibid.*

FORM 4.

Indorsement on copy defence and counter-claim to be served on third party.

"To the within-named *X. Y.*

"Take notice that if you do not appear to the within counter-claim of the within-named *C. D.* within eight days from the service of this defence and counter-claim upon you, you will be liable to have judgment given against you in your absence.

"Appearances are to be entered at ."

This form is prescribed by O. XXII., r. 6, *ante*, p. 269.

As to counter-claiming against other persons than the plaintiff,

Act 1875, Appx. B. Nos. 4—7.

See O. XXII., rr. 5—10, *ante*, pp. 268 to 270, and notes thereto.

As to the place for entering an appearance, see O. XII., *ante*, p. 210, *et seq.*, and notes thereto.

FORM 5.

Notice of payment into Court.

In the High Court of Justice. 1875. B. No.
Q. B. Division.

A. B. v. *C. D.*

Take notice that the defendant has paid into Court £ , and says that that sum is enough to satisfy the plaintiff's claim [*or* the plaintiff's claim for, *&c.*].

To Mr. *X. Y.*,
the Plaintiff's Solicitor.

Z.,
Defendant's Solicitor.

This form is prescribed by O. XXX., r. 2, *ante*, p. 288.

As to payment into Court, see O. XXX., *ante*, p. 287, *et seq.*, and notes thereto.

Acceptance of sum paid into court.

FORM 6.

In the High Court of Justice. 1875. B. No.
Q. B. Division.

A. B. v. *C. D.*

Take notice that the plaintiff accepts the sum of £ paid by you into Court in satisfaction of the claim in respect of which it is paid in.

This form is prescribed by O. XXX., r. 4, *ante*, p. 289.

As to payment out of Court to plaintiff of money paid in by defendant, see *Ibid.*, rr. 3, 4.

FORM 7.

Form of interrogatories.

In the High Court of Justice. 1874. B. No.
Division.
Between *A. B.*, Plaintiff,
and
C. D., *E. F.*, and *G. H.*, Defendants.

Interrogatories on behalf of the above-named [plaintiff *or* defendant, *C. D.*] for the examination of the above-named [defendants *E. F.* and *G. H.*, *or* plaintiff].

1. Did not, &c.
2. Has not, &c.

&c. &c. &c.

The defendant *E. F.* is required to answer the interrogatories numbered .

The defendant *G. H.* is required to answer the interrogatories numbered .

This form is prescribed by O. XXXI., r. 3, *ante*, p. 292. Act 1875, Appx. B. Nos. 8, 9.
As to discovery by interrogatories, see O. XXXI., rr. 1—10, 20, 23, *ante*, pp. 290 to 296, 302, 303, and notes thereto.

FORM 8.

Form of answer to interrogatories.

In the High Court of Justice. 1874. B. No.
Division.
Between *A. B.*, Plaintiff,
and
C. D., *E. F.*, and *G. H.*, Defendants.

The answer of the above-named defendant *E. F.* to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named *E. F.*, make oath and say as follows:—

.....

.....

This form is prescribed by O. XXXI., r. 7, *ante*, p. 295.
As to answers to interrogatories, see O. XXXI., rr. 6—10, *ante*, p. 295 to 296, and notes thereto.

FORM 9.

Form of affidavit as to documents.

In the High Court of Justice. 1874. B. No.
Division.
Between *A. B.*, Plaintiff,
and
C. D., Defendant.

I, the above-named defendant *C. D.*, make oath and say as follows:—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. That [*here state upon what grounds the objection is made, and verify the facts as far as may be*].

4. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

5. The last-mentioned documents were last in my possession or power on [*state when*].

6. That [*here state what has become of the last-mentioned documents, and in whose possession they now are*].

7. According to the best of my knowledge, information, and belief, I have not now, and never had in my possession, custody, or power, or in the possession, custody, or power of my solicitors or agents, solicitor or agent, or in the possession, custody, or power of any other person or persons on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum,

Act 1875, Appx. B. Nos. 9—10a.

paper, or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto.

This form is prescribed by O. XXXI., r. 13, *ante*, p. 299.

As to discovery and inspection of documents, see O. XXXI., rr. 11—22, *ante*, pp. 299 to 303, and notes thereto.

FORM 10.

Form of notice to produce documents.

In the High Court of Justice.
Q. B. Division.

A. B. v. *C. D.*

Take notice that the [plaintiff *or* defendant] requires you to produce for his inspection the following documents referred to in your [statement of claim, *or* defence, *or* affidavit, dated the day of , A.D.].

[*Describe documents required.*]

X. Y.,
Solicitor to the

To *Z.*,
Solicitor for

This form is prescribed by O. XXXI., r. 15, *ante*, p. 301. See next form.

As to this notice, see O. XXXI., rr. 14, 15, *ante*, pp. 300, 301.

FORM B. 10a.

Notice to produce (general form).

In the High Court of Justice. 18 . No. .
Division.

Between , Plaintiff,
and
, Defendant.

Take notice, that you are hereby required to produce and show to the Court on the trial of this action all books, papers, letters, copies of letters, and other writings and documents in your custody, possession, or power, containing any entry, memorandum, or minute relating to the matters in question in this action, and particularly

Dated the day of , 18 .

To the above-named h solicitor or agent

(Signed)
of
agent for
solicitor for the above-named

See s. 119 of the C. L. P. Act, 1852.

FORM 11.

In the High Court of Justice.
Q. B. Division.
A. B. v. *C. D.*

Form of Notice to inspect documents.

Take notice that you can inspect the documents mentioned in your notice of the day of A.D. [except the deed numbered in that notice] at my office on Thursday next, the instant, between the hours of 12 and 4 o'clock.

Or, that the [plaintiff *or* defendant] objects to give you inspection of the documents mentioned in your notice of the day of A.D. , on the ground that [*state the ground*]:—

This form is prescribed by O. XXXI., r. 16, *ante*, p. 301.

FORM 12.

In the High Court of Justice.
Division.
A. B. v. *C. D.*

Form of notice to admit documents.

Take notice that the plaintiff [*or* defendant] in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [*or* plaintiff], his solicitor or agent, at , on , between the hours of ; and the defendant [*or* plaintiff] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered, respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated, &c.

To *E. F.*, solicitor [*or* agent] for defendant [*or* plaintiff].
G. H., solicitor [*or* agent] for plaintiff [*or* defendant].

[*Here describe the documents, the manner of doing which may be as follows*:—]

ORIGINALS.

Description of Documents.	Dates.
Deed of covenant between *A. B.* and *C. D.* first part, and *E. F.* second part	January 1, 1848.
Indenture of lease from *A. B.* to *C. D.*	February 1, 1848.
Indenture of release between *A. B.*, *C. D.* first part, &c.	February 2, 1848.
Letter, defendant to plaintiff	March 1, 1848.
Policy of insurance on goods by ship "Isabella," on voyage from Oporto to London	December 3, 1847.
Memorandum of agreement between *C. D.*, captain of said ship, and *E. F.*	January 1, 1848.
Bill of Exchange for £100 at three months, drawn by *A. B.* on and accepted by *C. D.*, indorsed by *E. F.* and *G. H.*	May 1, 1849.

Act 1875, Appx. B. Nos. 12—14.

COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered, when, how and by whom.
Register of baptism of *A. B.* in the parish of *X.* . . .	January 1, 1848.	
Letter—plaintiff to defendant .	February 1, 1848.	Sent by General Post, February 2, 1848.
Notice to produce papers . .	March 1, 1848.	Served March 2, 1848, on defendant's attorney by *E. F.*, of — —
Record of a Judgment of the Court of Queen's Bench in an action, *J. S.* v. *J. N.* . .	Trinity Term, 10th Vict. . . .	
Letters Patent of King Charles II. in the Rolls Chapel . .	January 1, 1680. .	

This form is prescribed by O. XXXII., r. 3, *ante*, p. 304.

As to admissions, and notice to admit, see O. XXXII., *ante*, pp. 303, 304, and notes thereto.

FORM 13.

1875. B. No.

Setting down special case.

In the High Court of Justice.

Division.

Between *A. B.*, Plaintiff,

and

C. D., and others, Defendants.

Set down for argument the special case filed in this action on the day , 187 .

X. Y., solicitor for .

This form is prescribed by O. XXXIV., r. 5, *ante*, p. 307.

As to stating questions of law by special case, see O. XXXIV., *ante*, p. 306, and notes thereto.

FORM 14.

Form of notice of trial.

In the High Court of Justice.

Division.

A. B. v. *C. D.*

Take notice of trial of this action [*or* of the issues in this action ordered to be tried] by a judge and jury [*or as the case may be*] in Middlesex [*or as the case may be*], for the day of next.

X. Y., plaintiff's solicitor [*or as the case may be*].

Dated

To *Z.*, defendant's solicitor [*or as the case may be*].

This form is prescribed by O. XXXVI., r. 8, *ante*, p. 321. As to notice of trial, and the trial of actions, see O. XXXVI., *ante*, p. 317, *et seq.*, and notes thereto.

Act 1875, Appx. B. Nos. 14—16.

FORM 15.

Form of certificate of officer after trial by a jury.

30th November, 1876. 1876. No.
In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

I certify that this action was tried before the Honourable Mr. Justice and a special jury of the county of , on the 12th and 13th days of November, 1876.

The jury found [*state findings*].

The Judge directed that judgment should be entered for the plaintiff for *l.* with costs of summons [*or as the case may be*].

A. B.,
[*Title of officer.*]

This form is prescribed by O. XXXVI., r. 24, *ante*, p. 328. As to the entry of judgment, see O. XLI., *ante*, p. 361.

FORM 16.

Affidavit of scripts.

In the High Court of Justice.
Probate Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

I, *A. B.*, of , in the county of , party in this cause, make oath and say, that no paper or parchment writing, being or purporting to be, or having the form or effect of a will or codicil or other testamentary disposition of *E. F.*, late of , in the county of , deceased, the deceased in this cause, or being or purporting to be instructions for, or the draft of, any will, codicil, or testamentary disposition of the said *E. F.*, has at any time, either before or since his death, come to the hands, possession, or knowledge of me, this deponent, or to the hands, possession, or knowledge of my solicitors in this suit, so far as is known to me, this deponent, save and except the true and original last will and testament of the said deceased now remaining in the principal registry of this court [*or* hereunto annexed, *or as the case may be*], the said will bearing date the day of 18 [*or as the case may be*], also save and except [*here add the dates and particulars of any other testamentary papers of which the deponent has any knowledge*].

(Signed) *A. B.*

Sworn at on the day of 18 .
Before me,

[*Person authorized to administer oaths under the Act.*]

Act 1875, Appx. B. Nos. 16—19.

As to this form, see O. XXI., r. 2, *ante*, p. 266. It is not expressly referred to in any of the rules.

FORM 17.

Notice of motion.

18 . No.

In the High Court of Justice.
Division.

Between , Plaintiff,
and
, Defendant.

Take notice, that the Court will be moved on day the day of , 18 , at o'clock in the forenoon. or so soon thereafter as counsel can be heard, by that .

Dated the day of , 18 .

(Signed) of , agent for , solicitor for the

To

See O. LIII., *ante*, p. 398.

FORM 18.

Notice of entry of demurrer for argument.

18 . No. .

In the High Court of Justice.
Division.

Between , Plaintiff.
and
, Defendant.

Take notice, that I have this day entered for argument the demurrer of the to the in this action.

Dated the day of , 18 .

(Signed) of , agent for , solicitor for the .

To

See O. XXVIII., r. 6, *ante*, p. 281.

FORM 19.

Notice of discontinuance.

18 No. .

In the High Court of Justice.
Division.

Between , Plaintiff,
and
, Defendant.

Take notice that the plaintiff hereby [" *wholly discontinues this action,*" or "*withdraws so much of h claim in this action as relates*

to," &c. If not against all the defendants add " as against the defendant," &c.] Act 1875, Appx. B. Nos. 19—21.

Dated the day of , 18 .

(Signed)
of , agent for ,
solicitor for the plaintiff.

To

See O. XXIII., r. 1, *ante*, p. 271.

FORM 20.

18 . No. . Notice of entry of appearance.

In the High Court of Justice.
Division.

Between , Plaintiff,
and
, Defendant.

Take notice, that have this day entered an appearance at the Central Office, Royal Courts of Justice [*or* at the office of the registrar of the district registry] for the defendant to the writ of summons in this action;
the said defendant require [*or* do not require] delivery of a statement of claim.

Dated the day of , 18 .

(Signed)
of , agent for
solicitor for the defendant.

To

See O. XII., r. 6*b*, *ante*, p. 212.

FORM 21.

18 . No. . Notice of cross-examination of deponents at trial

In the High Court of Justice.
Division.

Between , Plaintiff,
and
, Defendant.

Take notice that the intend at the trial of this action to cross-examine the several deponents named and described in the schedule hereto on their affidavits therein specified;
and also take notice that you are hereby required to produce the said deponents for such cross-examination before the Court aforesaid.

Dated the day of , 18

(Signed)
agent for of
solicitor for the

To

Act 1875, Appx. B. Nos. 21—23.

THE SCHEDULE above referred to.

Name of Deponent.	Address and Description.	Date when Affidavit filed.

See O. XXXVIII., r. 4, *ante*, p. 348.

FORM 22.

Notice of renewal of writ of execution.

18 . No. .

In the High Court of Justice.
Division.

Between , Plaintiff.
and
, Defendant.

Take notice, that the writ of , issued in this action directed to the sheriff of , and bearing date the day of , 18 , has been renewed for one year from the day of , 18 .

Dated the day of , 18 .

(Signed)
of , agent for , solicitor for the .

To the sheriff of .

See O. XLII., r. 16, *ante*, p. 367.

FORM 23.

Notice as to stock under O. XLVI.

To the [*here add the name of the Company*].

Take notice that the stock comprised in and now subject to the trusts of the [*settlement, will, &c.*] referred to in the affidavit to which this notice is annexed consists of the following (that is to say) [*here specify the stock*].

This notice is intended to stop the transfer of the stock only, and not the receipt of dividends [*or*, the receipt of dividends on the stock as well as the transfer of the stock].

(Signed) *A. B.*

See O. XLVI., *ante*, p. 377.

FORM 24.

Act 1875, Appx. B. Nos. 24, 25.

18 . No.

In the High Court of Justice.
Division.

Between , Plaintiff,
and
, Defendant.

AFFIDAVITS

Affidavit of service of summons.

I, , of , solicitor for the above-named make oath and say as follows :—

I did on the day of , 18 , before the hour of in the noon, serve the above-named in this action with a true copy duly stamped of the summons hereto annexed marked A, by leaving it at the of , the said , situate with there .

Sworn at
this
day of 18
Before me,

This affidavit is filed on behalf of the .

(a) See O. IX., r. 2, and O. LVII., r. 8, *ante*, pp. 201, 414.

FORM 25.

18 . No.

Affidavit on registration of bill of sale.

In the High Court of Justice.
Division.

I, of , make oath and say as follows :—

1. The paper writing hereto annexed and marked A is a true copy of a bill of sale, and of every schedule or inventory thereto annexed or therein referred to, and of every attestation of the execution thereof, as made and given and executed by .

2. The said bill of sale was made and given by the said on the day of , 18 .

3. I was present and saw the said duly execute the said bill of sale on the said day of , 18 .

4. The said resides at [*state residence at time of swearing affidavit*] and is [*state occupation*].

5. The name subscribed to the said bill of sale as that of the witness attesting the due execution thereof is in the proper handwriting of me this deponent.

6. I am a solicitor of the Supreme Court, and reside at .

7. Before the execution of the said bill of sale by the said , I fully explained to the nature and effect thereof.

Sworn at
the day of , 18 .
Before me,

This affidavit is filed on behalf of .

FORM 26.

Act 1875, Appx. B. Nos. 26, 27.

18 . No. .

In the High Court of Justice.
Division.
Between , Judgment Creditor,
and
, Judgment Debtor.

Affidavit in support of garnishee order.

I, , of , the above-named judgment creditor [*or* solicitor for the above-named judgment creditor] make oath and say as follows :—

1. By a judgment of the Court given in this action, and dated the day of , 18 , it was adjudged that I [*or* the above-named judgment creditor] should recover against the above-named judgment debtor, , the sum of £ , and costs to be taxed, and the said costs were by a master's certificate dated the day of , 18 , allowed at £ .

2. The said still remains unsatisfied as to the extent of and interest amounting to £ .

3. [*Name, address, and description of garnishee*] is indebted to the judgment debtor, , in the sum of £ , or thereabouts.

4. The said is within the jurisdiction of this Court.

Sworn at
the day of , 18 .
Before me, .

This affidavit is filed on behalf of the .

See O. XLV., r. 2, *ante*, p. 373.

FORM 27.

Affidavit on interpleader.

18 . No. .

In the High Court of Justice.
Division.
Between , Plaintiff,
and
, Defendant.

I, , of , the defendant in the above action, make oath and say as follows :—

1. The writ of summons herein was issued on the day of , 18 , and was served on me on the day of , 18 . I have not yet delivered a statement of defence herein.

2. The action is brought to recover . The said ["*is*" *or* "*are*"] in my possession, but I claim no interest therein.

3. The right to the said subject-matter of this action has been

and is claimed [*if claim in writing make the writing an exhibit*] by one who [*state expectation of suit, or that he has already sued*]. Act 1875, Appx. B. Nos. 27, 28.

4. I do not in any matter collude with the said or with the above-named plaintiff, but I am ready to bring into court or to pay or dispose of the said in such manner as the Court may order or direct.

Sworn at , the day of , 18 .
Before me,

This affidavit is filed on behalf of the .

See O. I., r. 2, and notes, *ante*, p. 176.

FORM 28.

In the matter of [*here state the nature of the document comprising the stock, and add the date and other particulars, so far as known to the deponent, sufficiently to identify the document*]; and
In the matter of the Act of Parliament, 5 Vict. c. 5. Affidavit as to stock under O. XLVI.

I, , of , make oath and say that according to the best of my knowledge, information, and belief, I am [*or, if the affidavit is made by the solicitor, A. B.* of , is] beneficially interested in the stock comprised in the [*settlement, will, &c.*] above-mentioned, which stock, according to the best of my knowledge and belief, now consists of the stock specified in the notice hereto annexed.

This affidavit is filed on behalf of *A. B.*, whose address is [*state address for service*].

Appendix C.

APPENDIX (C).

PLEADINGS (a).

No. 1.

Action on an account stated.

Account Stated.

187 . B. No. .

In the High Court of Justice.
Division.

Writ issued 3rd August, 1875.

Between *A. B.*, Plaintiff,
and
E. F., Defendant.

Statement of claim.

Statement of Claim.

1. Between the 1st of January and the 28th of February, 1875, the plaintiff supplied to the defendant various articles of drapery; and accounts and invoices of the goods so supplied, and their prices, were from time to time furnished to the defendant, and payments on account were from time to time made by the defendant.

2. On the 28th of February, 1875, a balance remained due to the plaintiff of 75*l.* 9*s.*, and an account was on that day sent by the plaintiff to the defendant showing that balance.

(a) O. XIX., r. 4, *ante*, p. 254, provides that forms similar to those in this Appendix may be used.

As to pleadings generally, see O. XIX, *ante*, p. 248, *et seq.*, and notes thereto.

As to the contents, printing, and delivery of pleadings, see O. XIX., rr. 4—7, *ante*, pp. 252, 254, and notes thereto.

Rule 7, *ante*, p. 254, provides that every pleading shall be marked on the face with the date of the day on which it is delivered, and with the reference to the letter and number of the action, the division to which, and the judge (if any) to whom the action is assigned, the title of the action, the description of the pleading, and the name and place of business of the solicitor and agent (if any) delivering the same, or the name and address of the party delivering the same if he does not act by a solicitor. Neither this nor any other of the rules require the date on which the writ of summons was issued to be marked on the pleading; but the forms in Appendix (C) suggest that this date should be stated, and it is very convenient, and is the practice to do so. None of the forms suggest either of two other particulars which rule 7 requires to be stated on every pleading, namely, the date of its delivery, and the name, &c., of the person by whom it is delivered. There is no fixed practice as to the part of the pleading in which these particulars should appear; they must, however, according to the rule, be marked on the face. Sometimes they follow the description of the pleading immediately after the title, thus: Statement of claim, &c. delivered on the day of , 187 , by A.B., of &c., solicitor, &c., for the plaintiff; and sometimes they form a distinct statement at the end of the pleading, thus: This statement of claim, &c., was delivered on, &c., as above.

See, as to the time for delivering claim, O. XXI., *ante*, p. 264, *et seq.*; defence, O. XXII., p. 267, *et seq.*; reply, O. XXIV., p. 273, *et seq.*; and notes thereto.

As to counter-claims, see O. XIX., r. 3, and O. XXII., rr. 5—10, *ante*, pp. 249 and 268 to 270, and notes thereto.

As to the plaintiff's right to reply being general, see *ante*, p. 248.

As to the costs of unnecessary prolixity in pleadings, see O. XIX., r. 2, *ante*, p. 248, and R. S. C. (Costs), *post*, p. 628, r. 18.

3. On the 1st of March following, the plaintiff's collector saw the defendant at his house, and asked for payment of the said balance, and the defendant then paid him by cheque 25*l.* on account of the same. The residue of the said balance, amounting to 50*l.* 9*s.*, has never been paid. Act 1875, Appx. C. Nos. 1, 2.

The plaintiff claims *l.*

The plaintiff proposes that this action should be tried in the county of Northampton.

No. 2.

Administration Action.

Action for administration of estate of an intestate (*a*)

1876. B. No. 233.

In the High Court of Justice.
Chancery Division.
[*Name of Judge.*]

Writ issued 22nd December, 1876.

In the matter of the estate of *A. B.*, deceased.

Between *E. F.*, Plaintiff,
and
G. H., Defendant.

Statement of Claim.

Statement of claim.

1. *A. B.*, of *K.*, in the county of *L.*, died on the 1st of July, 1875, intestate. The defendant *G. H.* is the administrator of *A. B.*

2. *A. B.* died entitled to lands in the said county for an estate of fee simple, and also to some other real estate and to personal estate. The defendant has entered possession of the real estate of *A. B.*, and received the rents thereof. The legal estate in such real estate is outstanding in mortgagees under mortgages created by the intestate.

3. *A. B.* was never married; he had one brother only, who pre-deceased him without having been married, and two sisters only, both of whom also pre-deceased him, namely *M. N.* and *P. Q.* The plaintiff is the only child of *M. N.*, and the defendant is the only child of *P. Q.*

The plaintiff claims:—

1. To have the real and personal estate of *A. B.* administered in this Court, and for that purpose to have all proper directions given and accounts taken.

2. To have a receiver appointed of the rents of his real estate.

3. Such further or other relief as the nature of the case may require.

(*a*) See notes to Appendix (A), *ante*, p. 448.

Act 1875, Appx. C. Nos. 2, 3.

1876. B. No. 233.

In the High Court of Justice.
Chancery Division.
[*Name of Judge.*]

In the matter of the estate of *A. B.*, deceased.

Between *E. F.*, Plaintiff,
and
G. H., Defendant.

Statement of defence.

Statement of Defence.

1. The plaintiff is an illegitimate child of *M. N.* She was never married.

2. The intestate was not entitled to any real estate at his death, except a copyhold estate situate in the county of *R.*, and held of the manor of *S.* According to the custom of that manor, when the copyholder dies without issue, and without leaving a brother, or issue of a deceased brother, the copyhold descends to his elder sister and her issue in preference to his younger sister and her issue. *P. Q.* was older than *M. N.*

3. The personal estate of *A. B.* was not sufficient for the payment of his debts, and has all been applied in payment of his funeral and testamentary expenses, and part of his debts.

1876. B. No. 233.

In the High Court of Justice.
Chancery Division.
[*Name of Judge.*]

In the matter of the estate of *A. B.*, deceased.

Between *E. F.*, Plaintiff,
and
G. H., Defendant.

Reply.

Reply.

The plaintiff joins issue with the defendant upon his defence.

No. 3.

Action for administration of estate of a testator.

Administration Action.

1876. B. No. 234.

In the High Court of Justice.
Chancery Division.
[*Name of Judge.*]

Writ issued 22nd December, 1876.

In the matter of the estate of *A. B.*, deceased.

Between *E. F.*, Plaintiff,
and
G. H., Defendant.

1. Statement of claim.

Statement of Claim.

1. *A. B.*, of *K.*, in the county of *L.*, duly made his last will, dated the 1st day of March, 1873, whereby he appointed the de-

fendant and *M. N.* (who died in the testator's thereof, and devised and bequeathed his real a to and to the use of his executors in trust, to income thereof to the plaintiff for his life; and and in default of his having a son who shoul daughter who should attain that age, or marry his real estate for the person who would be the law, and as to his personal estate for the perso the testator's next of kin if he had died intest the death of the plaintiff, and such failure of l said.

2. The testator died on the 1st day of July, was proved by the defendant on the 4th of Oct plaintiff has not been married.

3. The testator was at his death entitled to estate; the defendant entered into the receipt of real estate and got in the personal estate; he ha of the real estate.

The plaintiff claims:—

1. To have the real and personal estate of *A.* in this Court, and for that purpose to have tions given and accounts taken.

2. Such further or other relief as the nature requre.

18

In the High Court of Justice.
Chancery Division.
[*Name of Judge.*]
In the matter of the estate of *A. B.*, dec
Between *E. F.*,

G. H.,

Statement of Defence.

1. *A. B.*'s will contained a charge of debts; he he was entitled at his death to some real estate w dant sold, and which produced the net sum of testator had some personal estate which the defen which produced the net sum of 1204*l.* The defenc whole of the said sums and the sum of 84*l.* which received from rents of the real estate in the p funeral and testamentary expenses and some of t testator. The defendant made up his accounts a thereof to the plaintiff on the 10th of January, 18 the plaintiff free access to the vouchers to verify but he declined to avail himself of the defendan defendant submits that the plaintiff ought to pay t action.

Act 1875, Appx. C. No. 3, 4,

1876. B. No. 234.

In the High Court of Justice.
Chancery Division.
[*Name of Judge.*]

In the matter of the estate of *A. B.*, deceased.

Between *E. F.*, Plaintiff,
and
G. H., Defendant.

Reply

Reply.

The plaintiff joins issue with the defendant upon his defence.

No. 4.

Action for administration—breaches of trust—receiver.

Administration Action.

1876. B. No. 235.

In the High Court of Justice.
Chancery Division.
[*Name of Judge.*]

Writ issued 22nd December, 1876.

In the matter of the estate of *W. H.*, deceased.

Between *A. B.* and C. his wife, Plaintiffs,
and
E. F. and *G. H.* Defendants.

Statement of claim.

Statement of Claim.

1. W. H. of H., in the county of L., duly made his last will dated the 19th day of March, 1861, whereby he appointed the defendants the executors thereof, and bequeathed to them all his personal estate in trust, to call in, sell, and convert the same into money, and thereout to pay his debts and funeral and testamentary expenses, and to divide the ultimate surplus into three shares, and to pay one of such three shares to each of his two children, T. H., and E., the wife of E. W., and to stand possessed of the remaining third share upon trust for the children of the testator's son, J. H., in equal shares to be divided among them when the youngest of such children should attain the age of 21 years. And the testator devised his real estates to the defendants upon trust until the youngest child of the said J. H. should attain the age of 21 years, to pay one third part of the rents thereof to the said T. H., and one other third part thereof to the said E. W., and to accumulate the remaining third part by way of compound interest, and so soon as the youngest child of the said J. H. should attain the age of 21 years, to sell the said real estates, and out of the proceeds of such sale to pay the sum of 1000*l.* to the said T. H., and to invest one moiety of the residue in manner therein mentioned, and stand possessed thereof in trust to pay the income thereof to the said E., the wife of the said E. W., during her life for her separate use, and after her death for her children, the interests of such children being contingent on their attaining the age of 21 years, and to divide the other moiety of such proceeds of sale and the accumulations of the third share of rents therein-

before directed to be accumulated among such of the children of the said J. H. as should be then living, and the issue of such of them as should be then dead, in equal shares per stirpes. Act 1875, Appx. C. No. 4.

2. The testator died on the 25th day of April, 1873, and his said will was proved by the defendants in the month of June, 1873.

3. The testator died possessed of one third share in a leasehold colliery called the Paradise colliery, and in the engines, machinery, stock-in-trade, book debts, and effects belonging thereto. He was also entitled to real estate, and other personal estate.

4. The testator left T. H. and E., the wife of E. W., him surviving. J. H. had died in the testator's lifetime, leaving four children, and no more. The plaintiff *C. B.* is the youngest of the children of J. H., and attained the age of 21 years on the 1st of June, 1871. The other three children of J. H. died without issue in the lifetime of the testator.

5. E. W. has several children, but no child has attained the age of 21 years.

6. T. H. is the testator's heir-at-law.

7. The defendants have not called in, sold, and converted into money the whole of the testator's personal estate, but have allowed a considerable part thereof to remain outstanding; and in particular the defendants have not called in, sold, or converted into money the testator's interest in the said colliery, but have, from the death of the testator to the present time, continued to work the same in partnership with the other persons interested therein. The estate of the testator has sustained considerable loss by reason of such interest not having been called in, sold, or converted into money.

8. The defendants did not upon the death of the testator sell the testator's furniture, plate, linen, and china, but allowed the testator's widow to possess herself of a great part thereof, without accounting for the same, and the same has thereby been lost to the testator's estate.

9. The defendants have not invested the share of the testator's residuary personal estate given by his will to the children of the testator's son J. H., and have not accumulated one third of the rents and profits of his real estate as directed by the said will, but have mixed the same share and rents with their own moneys, and employed them in business on their own account.

10. The defendants have sold part of the real estates of the testator, but a considerable part thereof remains unsold.

11. A receiver ought to be appointed of the outstanding personal estate of the testator, and the rents and profits of the real estate remaining unsold:

The plaintiffs claim:—

1. That the estate of the said testator may be administered, and the trusts of his will carried into execution under the direction of the Court.

Act 1875, Appx. C. No. 4.

2. That it may be declared that the defendants, by carrying on the business of the said colliery instead of realizing the same, have committed a breach of trust, and that the parties interested in the testator's estate are entitled to the value of the testator's interest in the said partnership property as it stood at the testator's death, with interest thereon, or at their election to the profits which have been made by the defendants in respect thereof since the testator's death, whichever shall be found most for their benefit.

3. That an account may be taken of the interest of the testator in the said colliery, and in the machinery, book debts, stock, and effects belonging thereto, according to the value thereof at the testator's death, and an account of all sums of money received by or by the order, or for the use of the defendants, or either of them, on account of the testator's interest in the said colliery, and that the defendants may be ordered to make good to the estate of the testator the loss arising from their not having realized the interest of the testator in the said colliery within a reasonable time after his decease.

4. That an account may be taken of all other personal estate of the testator come to the hands of the defendants, or either of them, or to the hands of any other person by their or either of their order, or for their or either of their use, or which, but for their wilful neglect or default, might have been so received; and an account of the rents and profits of the testator's real estate, and the money arising from the sale thereof, possessed or received by or by the order, or for the use of the defendants, or either of them.

5. That the real estate of the testator remaining unsold may be sold under the direction of the Court.

6. That the defendants may be decreed, at the election of the parties interested in the testator's estate, either to pay interest at the rate of 5*l.* per cent. per annum upon such moneys belonging to the estate of the testator as they have improperly mixed with their own moneys and employed in business on their own account, and that half-yearly rests may be made in taking such account as respects all moneys which by the said will were directed to be accumulated, or to account for all profits by the employment in their business of the said trust money.

7. That a receiver may be appointed of the outstanding personal estate of the testator, and to receive the rents and profits of his real estate remaining unsold.

8. Such further or other relief as the nature of the case may require.

1876. B. 235. Act 1875, Appx. C. No. 4.

In the High Court of Justice.
Chancery Division.
[*Name of Judge.*]

Between *A. B.* and *C.* his wife, Plaintiffs,
and
E. F. and *G. H.*, Defendants.

Statement of Defence of the above-named Defendants. Statement of defence.

1. Shortly after the decease of the testator, the defendants, as his executors, possessed themselves of and converted into money the testator's personal estate, except his share in the colliery mentioned in the plaintiff's statement of claim. The moneys so arising were applied in payment of part of the testator's debts and funeral and testamentary expenses, but such moneys were not sufficient for the payment thereof in full.

2. The Paradise Colliery was, at the testator's decease, worked by him in partnership with J. Y., and W. Y., and T. Y., both since deceased. No written articles of partnership had been entered into, and for many years the testators had not taken any part in the management of the said colliery, but it was managed exclusively by the other partners, and the defendants did not know with certainty to what share therein the testator was entitled.

3. Upon the death of the testator, the defendants endeavoured to ascertain the value of the testator's share in the colliery, but the other partners refused to give them any information. The defendants hereupon had the books of the colliery examined by a competent accountant, but they had been so carelessly kept that it was impossible to obtain from them any accurate information respecting the state of the concern; it was, however, ascertained that a considerable sum was due to the testator's estate.

4. Between the death of the testator and the beginning of the year 1874, the defendants made frequent applications to J. Y., W. Y., and T. Y., for a settlement of the accounts of the colliery. Such applications having proved fruitless, the defendants in January 1874, filed their bill of complaint in the Court of Chancery against J. Y., W. Y., and T. Y., praying for an account of the partnership dealings between the testator and the defendants thereto, and that the partnership might be wound up under the direction of the Court.

5. The said T. Y. died in the year 1874, and the suit was revived against J. P. and T. S., his executors. The suit is still pending.

6. As to the Paradise Colliery, the defendants have acted to the best of their judgment for the benefit of the testator's estate, and they deny being under any liability in respect of the said colliery not having been realized. They submit to act under the direction of the Court as to the further prosecution of the said suit, and generally as to the realization of the testator's interest in the said colliery.

7. With respect to the statements in the eighth paragraph of the statement of claim, the defendants say, that upon the death of the testator, they sold the whole of his furniture, linen, and china.

Act 1875, Appx. C. Nos. 4, 5.

and also all his plate, except a few silver teaspoons of very small value, which were taken possession of by his widow, and they applied the proceeds of such sale as part of the testator's personal estate, and they deny being under any liability in respect of such furniture, linen, china, and plate.

8. With respect to the statements in paragraph seven of the statement of claim, the defendants say that all moneys received by them, or either of them, on account of the testator's estate, were paid by them to their executorship account at the bank of Messrs. H. & Co., and until the sale of the testator's real estate took place as hereinafter mentioned, the balance to their credit was never greater than was necessary for the administration of the trusts of the testator's will, and they therefore were unable to make any such investment or accumulation as directed by the testator's will. No moneys belonging to the testator's estate have ever been mixed with the moneys of the defendants, or either of them, nor has any money of the testator's been employed in business since the testator's decease, except that his share in the said colliery, for the reason hereinbefore appearing, has not been got in.

9. In 1874, after the plaintiff *C. B.* had attained her age of 21 years, the defendants sold the real estate of the testator for sums amounting to 15,080*l.*, and no part thereof remains unsold. They received the purchase moneys in December 1874, and on the day of , 1875, they paid such proceeds into Court to the credit of this action, with the exception of 500*l.* retained on account of costs incurred and to be incurred by them.

1876. B. No. 235.

In the High Court of Justice.
Chancery Division.
[*Name of Judge.*]

Between *A. B.* and *C.* his wife, Plaintiffs,
and
E. F. and *G. H.*, Defendants.

Reply.

Reply.

The plaintiff joins issue with the defendants upon their defence.

No. 5.

Del Credere Agent.

Action against del credere agents.

187 . B. No.

In the High Court of Justice.
Division.

Writ issued 3rd August, 1875.

Between *A. B.* and Company, Plaintiffs,
and
E. F. and Company, Defendants.

Statement of claim.

Statement of Claim.

1. The plaintiffs are manufacturers of artificial manures, carrying on business at , in the county of .

2. The defendants are commission agents, carrying on business in London.

3. In the early part of the year , the plaintiffs commenced, and down to the , 187 , continued to consign to the defendants, as their agents, large quantities of their manures for sale, and the defendants sold the same, and received the price thereof and accounted to the plaintiffs therefor.

4. No express agreement has ever been entered into between the plaintiffs and the defendants with respect to the terms of the defendants' employment as agents. The defendants have always charged the plaintiffs a commission at per cent. on all sales effected by them, which is the rate of commission ordinarily charged by del credere agents in the said trade. And the defendants, in fact, always accounted to the plaintiffs for the price, whether they received the same from the purchasers or not.

5. The plaintiffs contend that the defendants are liable to them as del credere agents, but if not so liable are under the circumstances hereinafter mentioned liable as ordinary agents.

6. On the , the plaintiffs consigned to the defendants for sale a large quantity of goods, including tons of .

7. On or about the , the defendants sold tons of part of such goods to one *G. H.* for *l.*, at three months' credit, and delivered the same to him.

8. *G. H.* was not, at that time, in good credit, and was in insolvent circumstances, and the defendants might, by ordinary care and diligence, have ascertained the fact.

9. *G. H.* did not pay for the said goods, but before the expiration of the said three months for which credit had been given was adjudicated a bankrupt, and the plaintiffs have never received the said sum of *l.*, or any part thereof.

The plaintiffs claim :—

1. Damages to the amount of *l.*
2. Such further or other relief as the nature of the case may require.

The plaintiffs propose that this action should be tried in the county of .

[*Title as in claim, omitting date of issue of writ.*]

Statement of Defence.

Statement of defence.

1. The defendants deny that the said commission of per cent. mentioned in paragraph 4 of the claim is the rate of commission ordinarily charged by del credere agents in the said trade, and say that the same is the ordinary commission for agents other than del credere agents, and they deny that they ever accounted to the plaintiffs for the price of any goods, except after they had received the same from the purchasers.

Act 1875, Appx. C. Nos. 5, 6.

2. The defendants deny that they were ever liable to the plaintiffs as del credere agents.

3. With respect to the eighth paragraph of the plaintiffs' statement of claim, the defendants say that at the time of the said sale to the said *G. H.*, the said *G. H.* was a person in good credit. If it be true that the said *G. H.* was then in insolvent circumstances (which the defendants do not admit), the defendants did not and had no reason to suspect the same, and could not by ordinary care or diligence have ascertained the fact.

[*Title as in Defence.*]

Reply.

Reply.

The plaintiffs join issue upon the defendants' statement of defence.

No. 6.

Action on bill of exchange—indorsee against acceptor.

Action on Bill.

187 . B. No.

In the High Court of Justice.
Division.

Writ issued 3rd August, 1876.

Between *A. B.* and *C. D.*, Plaintiffs,
and
E. F. and *G. H.*, Defendants.

Statement of claim.

Statement of Claim.

1. Messrs. *M. N. & Co.*, on the day of , drew a bill of exchange upon the defendants for *l.* payable to the order of the said Messrs. *M. N. & Co.* three months after date, and the defendants accepted the same.

2. Messrs. *M. N. & Co.* indorsed the bill to the plaintiffs.

3. The bill became due on the , and the defendants have not paid it.

The plaintiffs claim:—

[*Title.*]

Statement of defence.

Statement of Defence.

1. The bill of exchange mentioned in the statement of claim was drawn and accepted under the circumstances hereinafter stated, and except as hereinafter mentioned there never was any consideration for the acceptance or payment thereof by the defendants.

2. Shortly before the acceptance of the said bill it was agreed

between the said Messrs. *M. N. & Co.*, the drawers thereof, and the defendants, that the said Messrs. *M. N. & Co.* should sell and deliver to the defendants free on board ship at the port of 1200 tons of coal during the month of , and that the defendants should pay for the same by accepting the said Messrs. *M. N. & Co.'s* draft for *l.* at six months. Act 1875, Appx. C. No. 6.

3. The said Messrs. *M. N. & Co.* accordingly drew upon the defendants, and the defendants accepted the bill of exchange now sued upon.

4. The defendants did all things which were necessary to entitle them to delivery by the said Messrs. *M. N. & Co.* of the said 1200 tons of coals under their said contract, and the time for delivery has long since elapsed; but the said Messrs. *M. N. & Co.* never delivered the same, or any part thereof, but have always refused to do so, whereby the consideration for the defendants' acceptance has wholly failed.

5. The plaintiffs first received the said bill, and it was first indorsed to them after it was overdue.

6. The plaintiffs never gave any value or consideration for the said bill.

7. The plaintiffs took the said bill with notice of the facts stated in the second, third, and fourth paragraphs hereof.

[*Title.*]

Reply. Reply

1. The plaintiffs join issue upon the defendants' statement of defence.

2. The plaintiffs gave value and consideration for the said bill in manner following, that is to say, on the day of 187 , the said Messrs. *M. N. & Co.* were indebted to the plaintiffs in about *l.*, the balance of an account for goods sold from time to time by the plaintiffs to them. On that day they ordered of the plaintiffs further goods to the value of above *l.*, which last mentioned goods have since been delivered by the plaintiffs to them. And at the time of the order for such last mentioned goods it was agreed between Messrs. *M. N. & Co.* and the plaintiffs, and the order was received upon the terms, that they should indorse and hand over to the plaintiffs the bill of exchange sued upon, together with various other securities on account of the said previous balance, and the price of the goods so ordered on that day. The said securities, including the bill sued upon, were thereupon on the same day indorsed and handed over to the plaintiffs.

See *Earp* v. *Henderson*, 3 Ch. D. 253, where the above form is commented on; and *Hall* v. *Eve*, 4 Ch. D. 341, C. A.

Act 1875, Appx. C. No. 7.

No. 7.

Action on Bill.

187 . B. No.

Action on bill of exchange and consideration.

In the High Court of Justice.
Division.

Writ issued 3rd August, 1876.

Between *A. B.* and *C. D.*, Plaintiffs,
and
E. F. and *G. H.*, Defendants.

Statement of claim.

Statement of Claim.

1. The plaintiffs are merchants, factors, and commission agents, carrying on business in London.

2. The defendants are merchants and commission agents, carrying on business at Hong Kong.

3. For several years prior to the , 1875, the plaintiffs had been in the habit of consigning goods to the defendants for sale, as their agents, and the defendants had been in the habit of consigning goods to the plaintiffs for sale, as their agents; and each party always received the price of the goods sold by him for the other; and a balance was from time to time struck between the parties, and paid.

On the of , the moneys so received by the defendants for the plaintiffs, and remaining in their names, largely exceeded the moneys received by the plaintiffs for the defendants, and a balance of *l.* was accordingly due to the plaintiffs from the defendants.

4. On or about the , 1875, the plaintiffs sent to the defendants a statement of the accounts between them, showing the said sum as the balance due to the plaintiffs from the defendants, and the defendants agreed to the said statement of accounts as correct, and to the said sum of *l.* as the balance due by them to the plaintiffs, and agreed to pay interest on such balance if time were given to them.

5. The defendants requested the plaintiffs to give them three months' time for payment of the said sum of *l.*, and the plaintiffs agreed to do so upon the defendants accepting the bills of exchange hereinafter mentioned.

6. The plaintiffs thereupon on the drew two bills of exchange upon the defendants, one for *l.* and the other for *l.*, both payable to the order of the plaintiffs three months after date, and the defendants accepted the bills.

The said bills became due on the , 187 , and the defendants have not paid the bills, or either of them, nor the said sum of *l.*

The plaintiffs claim:—
l. and interest to the date of judgment.

The plaintiffs propose that the action should be tried in London.

No. 8.

Act 1875, Appx. C. No. 8.

Damages to Goods Carried by Sea.

In the High Court of Justice, Division. 187 . B. No.

Action for damages to goods carried by sea.

Writ issued [ ].

[The "Ida"] [*in Admiralty action insert name of ship*].

Between *A. B.* and *C. D.*, Plaintiffs,
and
E. F. and *G. H.*, Defendants.

Statement of Claim.

Statement of claim.

[1. The "Ida" is a vessel of which no owner or part owner was, at the time of the institution of this cause, domiciled in England or Wales] [*a statement to this effect may be inserted if the action be under sect.* 6 *of Admiralty Act*, 1861].

2. In the month of February, 1873, Messrs. L. and Company, of Alexandria, caused to be shipped 6110 ardebs of cotton seed on board the said vessel, then lying in Port Said (Egypt), and the then master of the vessel received the same, to be carried from Port Said to Hull, upon the terms of three bills of lading, signed by the master, and delivered to Messrs. L. and Company.

3. The three bills of lading, being in form exactly similar to one another, were and are, so far as is material to the present case, in the words, letters, and figures following, that is to say:—

"Shipped in good order and well conditioned by L. & Co., Alexandria (Egypt) in and upon the good ship called the 'Ida,' whereof is master for the present voyage Ambrozio Chiapella, and now riding at anchor in the port of Port Said (Egypt) and bound for Hull, 6110 ardebs of cotton seed being marked and numbered as in the margin, and are to be delivered in the like good order and well-conditioned at the aforesaid port of Hull (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, save risk of boats so far as ships are liable thereto, excepted), unto order or to assigns paying freight for the said goods at the rate of (19*s.*) say 19*s.* sterling in full per ton of 20 cwt. delivered with 10*l.* gratuity. Other conditions as per charter-party, dated London, 4th October, 1872, with primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to three bills of lading all of this tenor and date, the one of which three bills being accomplished, the other two to stand void. Dated in Port Said (Egypt) 6th February, 1873. 100 dunnage mats. Fifteen working days remain for discharging."

4. The persons constituting the firm of Messrs. L. and Company are identical with the members of the plaintiffs' firm.

5. The vessel sailed on her voyage to Hull and duly arrived there on or about the 7th day of May, 1873.

6. The cotton seed was delivered to the plaintiffs, but not in as

Act 1875, Appx. C. Nos. 8, 9.

good order and condition as it was when shipped at Port Said; but was delivered to the plaintiffs greatly damaged.

7. The deterioration of the cotton seed was not occasioned by any of the perils or causes in the bills of lading excepted.

8. By reason of the premises the plaintiffs lost a great part of the value of the said cotton seed, and were put to great expense in and about keeping, warehousing, and improving the condition of the said cotton seed, and in and about having the same surveyed.

The plaintiffs claim the following relief:—

1. *l.* for damages, [*this may be inserted if the action be an Admiralty action in rem*] [and the condemnation of the said vessel and the defendant and his bail in the same];

2. Such further relief as the nature of the case requires.

[*Title.*]

Statement of defence.

Statement of Defence.

1. They [the Defendants] deny the truth of the allegations contained in the sixth, seventh, and eighth articles of the said petition [? claim].

2. The deterioration, if any, to the cotton seed was occasioned by the character and quality of the cotton seed when shipped on board the "Ida," and by the inherent qualities of the cotton seed, and by shipping water in a severe storm which occurred on the day of , in latitude during the voyage, or by some or one of such causes.

[*Title.*]

Reply.

Reply.

The plaintiffs join issue upon the statement of defence.

No. 9.

Action on bottomry bond (Admiralty).

Bottomry Bond.

In the High Court of Justice.
Admiralty Division.

Writ issued [ ].

The "Onward."

Between *A. B.* and *C. D.*, Plaintiffs,
and
E. F. and *G. H.*, Defendants.

Statement of claim.

Statement of Claim.

1. The "Onward," a ship of 933 tons register, or thereabouts, belonging to the United States of America, whilst on a voyage from

Moulmein to Queenstown or Falmouth, for orders, and from thence, to a port of discharge in the United Kingdom or on the Continent between Bordeaux and Hamburg, both ports inclusive, laden with a cargo of teak timber, was compelled to put into Port Louis, in the island of Mauritius, in order to repair and refit.

2. The master of the "Onward," being without funds or credit at Port Louis, and being unable to pay the expense of the said repairs, and the necessary disbursements of the said ship at Port Louis, so as to enable the said ship to resume and prosecute her voyage, and after having communicated with his owners, and with the owners and consignees of the cargo, was compelled to resort to a loan of 24,369 dollars on bottomry of the said ship, her cargo and freight, for the purpose of enabling him to bear the said expenses and disbursements, which sum Messrs. H. and Company, of Port Louis, at the request of the master by public advertisement, advanced to the said master at and after the rate of 128 dollars for every 100 dollars advanced, and accordingly the said master, by a bond of bottomry, dated the 13th of October, 1870, by him duly executed in consideration of the sum of 24,369 dollars, Mauritius currency, paid to him by the said Messrs. H. and Company, bound himself and the said ship and her cargo, namely about 940 tons of teak timber, and her freight, to pay unto Messrs. H. and Company, their assigns, or order or indorsees, the said sum of 24,369 dollars with the aforesaid maritime premium thereon, within twenty days next after the arrival of the "Onward" at her port of discharge, from the said intended voyage, the said payment to be made both in capital and interest in British sterling money, at and after the rate of 4*s.* for every dollar with a condition, that in case the said ship and cargo should be lost, during her voyage from Port Louis to Queenstown or Falmouth, for orders, and thence to her port of discharge in the United Kingdom or on the Continent between Bordeaux and Hamburg, both ports inclusive, then, that the said sum of 24,369 dollars, and maritime premium thereon, should not be recoverable.

3. The "Onward" subsequently proceeded on her voyage, and on the 7th of February, 1871, arrived with her cargo on board at the port of Liverpool, which was her port of discharge.

4. The bond was duly endorsed and assigned to the plaintiffs.

5. The ship has been sold by order of the Court, and the proceeds of the sale thereof have been brought into Court, and the freight has also been paid into Court.

6. The said sum of 24,369 dollars with the maritime premium thereon, still remain due to the plaintiffs. By a decree made on the 10th of May, 1871, the Court pronounced for the validity of the bond, so for as regarded the ship and freight, and condemned the proceeds of the ship and freight in the amount due on the bond. The principal and premium still remain owing to the plaintiffs, and the proceeds of the said ship and freight available for payment thereof are insufficient for such payment.

The plaintiffs claim:—

1. That the Court pronounce for the validity of the bond so far as regards the cargo.

Act 1875, Appx. C. No. 9.

2. That the Court condemn the defendants and their bail in so much of the amount due to the plaintiffs on the bond, for principal maritime premium, and for interest, from the time when such principal and premium ought to have been paid as the proceeds of the ship and freight available for payment of the bond shall be insufficient to satisfy, and in costs.

3. Such further relief as the nature of the case requires.

[*Title.*]

Statement of defence.

Statement of Defence.

The defendants say that the—

1. Several averments in the second article of the statement [claim] contained are respectively untrue, except the averment that the bottomry bond therein mentioned was given and executed.

3. The "Onward" proceeded on the voyage in the first paragraph of the claim mentioned, under a charter party made between the defendants and the owners of the vessel, who resided at New York. And the cargo in the said paragraph mentioned belonged to the defendants, and was shipped at Moulmein, by Messrs. T. F. and Company, of Moulmein, consigned to the defendants.

4. When the "Onward" put into Port Louis, the master placed his ship in the hands of Messrs. H. and Company, the persons in the second paragraph of the claim mentioned, and the repairs and disbursements in the said second article mentioned were made, directed, and expended under the orders, management, and on the credit of the said Messrs. H. and Company, who at the outset contemplated the necessity of securing themselves by the hypothecation of the ship, freight, and cargo.

5. The master of the "Onward" and Messrs. H. and Company did not communicate to the said shippers of the cargo, or to the defendants who carried on business at Glasgow, as the master knew, the intention of hypothecating the ship, freight, and cargo, or the circumstances which might render such hypothecation advisable or necessary, but, on the contrary, without reasonable cause or excuse, abstained from so doing, although the comparatively small value of the ship and freight to be earned, rendered it all the more important that such communication should have been made.

6. A reasonable and proper time was not allowed to elapse between the advertisements for the bottomry loan and the acceptance of Messrs. H. and Company's offer to take such loan.

[*Title.*]

Reply

Reply.

1. The plaintiffs say that the defendants, since the 31st day of December, 1868, have been the only persons forming the firm of T. F. & Co., of Moulmein, mentioned in the third paragraph of the defence.

2. After the master of the "Onward" put into Port Louis as aforesaid, he employed Messrs. H. and Company, in the claim mentioned, as his agents, and by his directions they by letter communicated to the defendants' firms at Moulmein and Glasgow the circumstances of the ship's distress, and the estimated amount of her repairs.

3. The said Messrs. H. and Company shortly after the said ship was put into their hands at Port Louis, offered the said master, in case he should require them to do so, to make the necessary advances for the ship's repairs, and to take his draft at 90 days' sight on Messrs. B. Brothers, of London, at the rate of 5 per cent. discount for the amount of the advances, together with a bottomry bond on ship, cargo, and freight as collateral security, the bond to be void should the draft be accepted. The said master, and the said Messrs. H. and Company, by letter, communicated to the owners of the "Onward" the circumstances of the said ship's distress, and the aforesaid offer of the said Messrs. H. and Company, and the said master by his letter requested the said owners to give him their directions on the subject. The said owners shortly after receiving such letters, by letter communicated with the defendants at Glasgow, and forwarded to them copies of the said lastly-mentioned letters of the said master, and of the said Messrs. H. and Co.

4. The defendants' houses at Moulmein and Glasgow respectively received the letters referred to in the second paragraph of this reply in time to have communicated with the said master at Port Louis before the giving of the said bottomry bond.

5. The defendants received the said copies of letters referred to in paragraph 4 of this reply, in time for them to have communicated thereon with the said master at Port Louis before the giving of the said bond.

6. The defendants did not at any time answer the said communications of the said Messrs. H. and Company, or in any way communicate, or attempt to communicate with the said master, or to direct him not to give, or prevent him from giving the said bottomry bond on the said cargo.

7. The said bond was duly advertised for sale, and was subsequently, and after a proper interval had elapsed, sold by auction in the usual way. There were several bidders at the sale, and the said Messrs. H. and Company were the lowest bidders in premium, and the said bond was knocked down to them. The said bond was not advertised for until the said ship was ready for sea, and up to that time the master of the said ship had expected to hear from her owners, and had hoped to be put in funds, and had not finally determined to resort to bottomry of the said ship, or her cargo, or freight.

8. Save as herein appears the plaintiffs deny the truth of the several allegations contained in the said answer.

[NOTE.—*The facts stated in this reply should, in general, be introduced by amendment into the statement of claim.*]

Act 1875, Appx. C. No. 10.

Title.]

Rejoinder.

Rejoinder. The defendants join issue upon the plaintiffs' Reply.

No. 10.

Action on Charter-party.

Action on charter-party.

187 . B. No.

In the High Court of Justice.
Division.

Writ issued 3rd August, 1876.

Between *A. B.* and *C. D.*, Plaintiffs,
and
E. F. and *G. H.*, Defendants.

Statement of claim.

Statement of Claim.

1. The plaintiffs were, on the 1st August, 1874, the owners of the steam ship "British Queen."

2. On the 1st August, 1874, the ship being then in Calcutta, a charter party was there entered into between John Smith, the master, on behalf of himself and the owners of the said ship, of the one part, and the defendants of the other part.

3. By the said charter party it was agreed, amongst other things, that the defendants should be entitled to the whole carrying power of the said steamship for the period of four months certain, commencing from the said 1st August, 1874, upon a voyage or voyages between Calcutta and Mauritius and back; that the defendants should pay for such use of the said steamship to the plaintiffs' agents at Calcutta, monthly, the sum of 1000*l.*; that the charter should terminate at Calcutta; and that if at the expiration of the said period of four months the said steamship should be upon a voyage, then the defendants should pay pro ratâ for the hire of the ship up to her arrival at Calcutta, and the complete discharge of her cargo there.

4. The "British Queen" made several voyages in pursuance of the said charter party, and the first three monthly sums of 1000*l.* each were duly paid.

5. The period of four months expired on the 1st December, 1874, and at that time the steamship was on a voyage from Mauritius to Calcutta. She arrived at Calcutta on the 13th December, and the discharge of her cargo there was completed on the 16th December, 1874.

6. The plaintiffs' agents at Calcutta called upon the defendants to pay to them the fourth monthly sum of 1000*l.*, and a sum of 500*l.* for the hire of the steamship from the 1st to the 16th December, 1874, but the defendants have not paid any part of the said sums.

The plaintiffs claim :— Act 1875, Appx. C. No. 10.

The sum of 1500*l.* and interest upon 1000*l.*, part thereof, from the 1st December, 1874, until judgment.

The plaintiffs propose that this action should be tried in London.

[*Title.*]

Statement of Defence.

Statement of defence and counter-claim.

1. By the charter party sued upon it was expressly provided that if any accident should happen to, or any repairs should become necessary to the engines or boilers of, the said steamship, the time occupied in repairs should be deducted from the period of the said charter, and a proportionate reduction in the charter money should be made.

2. On the repairs became necessary to the engines and boilers of the steamship, and ten days were occupied in effecting such repairs.

3. On the an accident happened to the engines of the steamship at Mauritius, and two days were occupied in effecting the repairs necessary in consequence thereof.

4. The defendants are therefore entitled to a reduction in the charter money of 400*l.*

By way of set-off and counter-claim the defendants claim as follows :— Counter claim.

5. By the charter party it was expressly provided that the charterers should furnish funds for the steamship's necessary disbursements, except in the port of Calcutta, without any commission or interest on any sum so advanced.

6. The defendants paid for the necessary disbursements of the ship in the port of Mauritius between the and the , 1874, sums amounting in all to 625*l.* 14*s.* 6*d.*

7. The charter party also contained an express warranty tha the steamship was at the date thereof capable of steaming nine knots an hour on a consumption of 30 tons of coal a day, and it was further provided by the charter party that the charterers should provide coal for the use of the said steamship.

8. The steamship was at the date of the charter party only capable of steaming less than to eight knots an hour, and that only on a consumption of more than 35 tons of coal a day.

9. In consequence of the matters mentioned in the last paragraph, the steamship finally arrived at Calcutta at least fifteen days later, and remained under charter at least fifteen days longer than she would otherwise have done. She was also during the whole period of the said charter at sea for a much larger number of days than she would otherwise have been, and consumed a much larger quantity of coal on each of such days than she would

Act 1875, Appx. C. Nos. 10, 11.

otherwise have done, whereby the defendants were obliged to provide for the use of the steamship much larger quantities of coal than they would otherwise have been.

The defendants claim:—

l. damages in respect of the matters stated in this set-off and counterclaim.

[*Title.*]

Reply.

Reply.

1. The plaintiffs join issue upon the second, third, and fourth paragraphs of the defendants' statement of defence.

2. With respect to the alleged set-off stated in paragraph six the plaintiffs do not admit the correctness of the amount therein stated. And all sums advanced by them for disbursements were paid or allowed to them by the plaintiffs by deducting the amount thereof from the third monthly sum of 1000*l.* paid (subject to such deduction) to the plaintiffs' agents at Calcutta by the defendants on or about the 12th November, 1874.

3. With respect to the alleged breach of warranty and the alleged damages therefrom stated in the seventh, eighth, and ninth paragraphs, the plaintiffs say that the steamship was at the date of the charter party capable of steaming nine knots an hour on a consumption of 30 tons of coal a day. If the steamship did not, during the said charter, steam more than eight knots an hour, and that on a consumption of more than 35 tons a day, as alleged (which the plaintiffs do not admit), it was in consequence of the bad and unfit quality of the coals provided by the defendants for the ship's use.

[*Title.*]

Rejoinder.

Joinder of Issue.

The defendants join issue upon the plaintiffs' reply to their set-off and counter-claim.

No. 11.

Action of damages for collision (Admiralty).

Action for Collision.

187 . B. No.

In the High Cour of Chancery.
Admiralty Division.

Writ issued [ ].

The "American."

Between *A. B.* and *C. D.*, Plaintiffs,
and
E. F. and *G. H.*, Defendants.

Statement of claim.

Statement of Claim.

1. Shortly before 8 a.m. on the 9th of December, 1874. the

brigantine "Katie," of 194 tons register of which the plaintiffs were owners, manned by a crew of eight hands all told, whilst on a voyage from Dublin to St. John's, Newfoundland, in ballast, was in latitude about 46° N., and longitude 40° 42' W., by account.

2. The wind at such time was about W. by S., a strong breeze, and the weather was clear, and the "Katie" was under dou ble reefed mainsail, reefed mainstaysail, middle staysail, lower topsail, reefed fore staysail, and jib, sailing full and by on the port tack, heading about N.W. ½ N., and proceeding at the rate of about five knots and a half per hour.

3. At such a time a steamship under steam and sail, which proved to be the screw steamship "American," was seen at the distance of three or four miles from the "Katie," broad on her port bow, and steering about E. or E. by S. The master of the "Katie," not having been able to take observations for several days, and her chronometer having run down, and the said master wishing to exchange longitudes with the "American," caused an ensign to be hoisted, and marked his longitude by account on a board which he exhibited over the port side. The "Katie" was kept full and by, and the "American" approached rapidly, and attempted to pass ahead of the "Katie," and caused immediate danger of collision, and although thereupon the helm of the "Katie" was put hard a-port and her mainsheet let go, the "American" with her stem struck the "Katie" on her port side, almost amidships, cutting her nearly in two, and the "Katie" sank almost immediately, her crew being saved by the steamer.

4. The "American" improperly neglected to keep clear of the "Katie."

5. The "American" improperly attempted to pass ahead of the "Katie."

6. The "American" improperly neglected to ease her engines, and improperly neglected to stop and reverse her engines in due time.

The plaintiffs claim:—

1. That it may be declared that the plaintiffs are entitled to the damage proceeded for.

2. That the bail given by the defendants be condemned in such damage, and in costs.

3. That the accounts and vouchers relating to such damage be referred to the Registrar assisted by merchants to report the amount thereof.

4. Such further and other relief as the nature of the case ma require.

[NOTE.—*The ordinary form of No.* 2 *is,* "That the defendants and their bail be condemned in such damage, and in costs."]

Act 1875, Appx. C. No. 11.

[*Title.*]

Statement of Defence.

Statement of defence.

The defendants say as follows :—

1. The "American" is a screw steamship, of 1368 tons register, with engines of 200-horse power nominal, belonging to the port of Liverpool, and at the time of the occurrences hereinafter mentioned was manned by a crew of forty hands all told, laden with a cargo of general merchandise, and bound from Port-au-Prince in the West Indies to Liverpool.

2. About 8.5 a.m. on the 28th of November, 1874, the "American" was in latitude 46° N., longitude 38° 16′ W., steering E. by S. true magnetic, making under all sail and steam about 12 knots an hour, the wind being about S.W. by S. true magnetic, blowing a strong breeze and the weather hazy, when a vessel, which afterwards proved to be the brigantine "Katie," was observed on the "American's" starboard bow about four miles distant, bearing about S.E. by E. true magnetic, close-hauled to the wind, and steering a course nearly parallel to that of the "American."

3. The "American" kept her course, and when the "Katie" was about three miles distant her ensign was observed by those on board the "American" run up to the main, and she was seen to have altered her course, and to be bearing down towards the "American." The "American's" ensign was afterwards run up, and her master, supposing that the "Katie" wanted to correct her longitude, or to speak the "American," continued on his course expecting that the "Katie," when she had got sufficiently close to speak or show her black board over the starboard side, would luff to the wind, and pass to windward of the "American."

4. The master of the "American" watched the "Katie" as she continued to approach the "American," and when she had approached as near as he deemed it prudent for her to come, he waved to her to luff, and shortly afterwards, on his observing her to be attempting to cross the bows of the "American," the helm of the latter was immediately put to starboard and engines stopped and reversed full speed; but notwithstanding, the "American" with her stem came into collision with the port side of the "Katie," a little forward of the main rigging.

5. The "American" engines were then stopped, and when the crew of the "Katie" had got on board of the "American," the latter's engines were reversed to get her clear of the "Katie," which sunk under the "American's" bows.

6. The "Katie" improperly approached too close to the "American."

7. Those on board the "Katie" improperly neglected to luff, and to pass to windward of the "American."

8. Those on board the "Katie" improperly attempted to cross the bows of the "American."

9. Those on board the "Katie" improperly ported her helm before the said collision.

10. Those on board the "Katie" improperly neglected to starboard her helm before the said collision.

[*Title.*]

Act 1875, Appx. C. Nos. 11, 12.

Reply.

The plaintiffs join issue upon the defendants' statement of defence.

Reply.

No. 12.

Action for Equipment.

Action for equipment of ship (Admiralty).

187 . B. No.

In the High Court of Justice.
Admiralty Division.

Writ issued [ ].

The "Two Ellens."

Between *A. B.* and *C. D.*, Plaintiffs,
and
E. F., Defendant.

Statement of Claim.

Statement of claim.

1. The said vessel was and is a British colonial vessel, belonging to the Port of Digby in Nova Scotia, of which no owner or part owner was at the time of this action or is domiciled in England or Wales.

2. At the time of the commencement of this action the said vessel was under arrest of this Court.

3. About the month of February, 1868, the said vessel was lying in the Port of London, in need of repairs, and of being equipped and supplied with certain other necessaries.

4. By the order of Messrs. K. L., who were duly authorised, the plaintiffs equipped and repaired the said vessel as she needed, and provided the vessel with necessaries, and there is now due to the plaintiffs for such necessary repairing and equipping, and other necessaries, the sum of 305*l.* 3*s.*, together with interest thereon from the 19th day of February, 1868.

The plaintiffs claim :—

1. Judgment for the said sum of 305*l.* 3*s.*, with such interest thereon as aforesaid until judgment.
2. The condemnation of the ship and the defendant and his bail therein and in the costs of this suit.
3. Such further relief as the nature of the case requires.

[*Title.*]

Statement of Defence.

Statement of defence.

1. By an instrument of mortgage, in the form and recorded as prescribed by the Merchant Shipping Act, 1854, bearing date the 9th of March, 1867, and executed by C. M., blacksmith, D. F.,

Act 1875, Appx. C. No. 12.

master mariner, and W. H., farmer, all of Weymouth, in the county of Digby, in Nova Scotia, the registered owners of 64-64ths parts or shares in the vessel, the said C. M., D. F., and W. H. mortgaged 64-64ths parts or shares in the vessel, of which the said D. F. was also master, to G. T., of Nova Scotia, in consideration of the sum of 5000 dollars advanced by him to the said owners, and for the purpose of securing the repayment by them to him of the said sum with interest thereon.

2. By an instrument of transfer, dated the 16th of July, 1868, in the form prescribed by the said Act, and executed by G. T., in consideration of the sum of 5000 dollars to G. T., paid by the defendant, G. T. transferred to the defendant the mortgage security.

3. The said sum of 5000 dollars, with interest thereon, still remains due on the said security.

4. The vessel was not under the arrest of this Court at the time of the commencement of this action.

5. The vessel did not need to be equipped or repaired as in the fourth paragraph of the plaintiffs' claim mentioned, and she did not at the time of the supply of the articles referred to in the said fourth paragraph as "necessaries" stand in need of such articles. On the contrary, the said vessel could have gone to sea and proceeded on and prosecuted her voyage without such equipments, repairs, and articles referred to as aforesaid, and such equipments, repairs, and other articles were done and effected and supplied for the purpose of reclassing the said vessel, and not for any other purpose; and the claim of the plaintiffs is not a claim for necessaries within the meaning of the Admiralty Court, 1861, s. 5.

6. The alleged necessaries were not supplied on the credit of the said vessel, but upon the personal credit of J. B., who was the broker for the vessel, and upon the agreement that the plaintiffs were not to have recourse to the vessel.

7. The defendant did not, nor did G. T., in any way, order, authorise, or become liable for, and neither of them is in any way liable in respect of the said alleged supplies or any part thereof, and the said vessel was at the time of the commencement of this action and she still is of a less value than the amount which, irrespective of the sums referred to in the next article of this answer, is due to the defendant on the said mortgage security.

8. The defendant, in order to save the vessel from being sold by this Court at the instance of certain of her mariners having liens on the said vessel for their wages, has been compelled to pay the said wages, and he claims, if necessary, to be entitled to stand in the place of such mariners, or to add the amounts so paid by him for wages to the amount secured by the said mortgage, and to have priority in respect thereof over the claim of the plaintiffs.

[*Title.*]

Act 1875, Appx. C. Nos. 12, 13.

Reply.

Reply.

1. The plaintiffs admit that 64-64th shares in the said ship, the "Two Ellens," were on or about the 9th day of March, 1867, mortgaged by the said C. M., D. F., and W. H., all of Weymouth, in the county of Digby, Nova Scotia, to the said G. T.

2. Save as aforementioned, all the several averments in the said answer contained are respectively untrue.

3. If there was or is any such instrument of transfer as is mentioned in the second article of the said answer the same has never been registered according to the provisions of the Merchant Shipping Act, 1854.

4. The said G. T. has never been domiciled in or resided in the United Kingdom, and is now resident in Nova Scotia, and the registered owners of the said vessel in the first paragraph of the said defence mentioned were always and are domiciled in Nova Scotia, and resident out of the United Kingdom.

[*Title.*]

Rejoinder.

Rejoinder.

The defendant joins issue upon the third and fourth paragraphs of the Reply.

No. 13.

Action for False Imprisonment.

Action for false imprisonment

187 . B. No.

In the High Court of Justice.
Division.

Writ issued 3rd August, 1876.

Between *A. B.*, Plaintiff,
and
E. F., Defendant.

Statement of Claim.

Statement of claim.

1. The plaintiff is a journeyman painter. The defendant is a builder, having his building yard, and carrying on business at , and for six months before and up to the 22nd August, 187 , the plaintiff was in the defendant's employment as a journeyman painter.

2. On the said 22nd August, 187 , the plaintiff came to work as usual in the defendant's yard, at about six o'clock in the morning.

3. A few minutes after the plaintiff had so come to work the defendant's foreman, *X. Y.*, who was then in the yard, called

Act 1875, Appx. C. No. 13.

the plaintiff to him, and accused the plaintiff of having on the previous day stolen a quantity of paint, the property of the defendant, from the yard. The plaintiff denied the charge, but *X. Y.* gave the plaintiff into the custody of a constable, whom he had previously sent for, upon a charge of stealing paint.

4. The defendant was present at the time when the plaintiff was given into custody, and authorised and assented to his being so given into custody; and in any case *X. Y.*, in giving him into custody, was acting within the scope and in the course of his employment as the defendant's foreman, and for the purposes of the defendant's business.

5. The plaintiff upon being so given into custody, was taken by the said constable a considerable distance through various streets, on foot to the police station, and he was there detained in a cell till late in the same afternoon, when he was taken to the police court, and the charge against him was heard before the magistrate then sitting there, and was dismissed.

6. In consequence of being so given into custody, the plaintiff suffered annoyance and disgrace, and loss of time and wages, and loss of credit and reputation, and was thereby unable to obtain any employment or earn any wages for three months.

The plaintiff claims *l.* damages.

The plaintiff proposes that this action should be tried in Middlesex.

[*Title.*]

Statement of Defence.

Statement of Defence.

1. The Defendant denies that he was present at the time when the plaintiff was given into custody, or that he in any way authorised or assented to his being given into custody. And the said *X. Y.*, in giving the plaintiff into custody, did not act within the scope or in the course of his employment as the defendant's foreman, or for the purposes of the defendant's business.

2. At some time about five or six o'clock on the , being the evening before the plaintiff was given into custody, a large quantity of paint had been feloniously stolen by some person or persons from a shed upon the defendant's yard and premises.

3. At about 5.30 o'clock on the evening of the the plaintiff, who had left off work about half an hour previously, was seen coming out of the shed when no one else was in it, although his work lay in a distant part of the yard from, and he had no business in or near, the shed. He was then seen to go to the back of a stack of timber in another part of the yard. Shortly afterwards the paint was found to have been stolen, and it was found concealed at the back of the stack of timber behind which the plaintiff had been seen to go.

4. On the following morning, before the plaintiff was given into custody, he was asked by *X. Y.* what he had been in the shed and behind the stack of timber for, and he denied having been in either place. *X. Y.* had reasonable and probable cause for suspecting, and did suspect that the plaintiff was the person who had stolen the paint, and thereupon gave him into custody.

[*Title.*]

Act 1875, Appx. C. Nos. 13, 14.

Reply.

The plaintiff joins issue upon the defendant's statement of defence.

Reply.

No. 14.

Foreclosure Action.

Action of foreclosure.

1876. W. No. 672.

In the High Court of Justice.
Chancery Division.
[*Name of Judge.*]
Writ issued [ ].

Between *R. W.*, Plaintiff,
and
O. S. and *J. B.*, Defendants.

Statement of Claim.

Statement of claim.

1. By an indenture dated the 25th of March, 1867, made between the defendant O. S. of the one part, and the plaintiff of the other part, the defendant O. S., in consideration of the sum of 10,000*l.* paid to him by the plaintiff, conveyed to the plaintiff and his heirs a farm containing 398 acres, situate in the parish of B., in the county of D., with all the coal mines, seams of coal, and other mines and minerals in and under the same, subject to a proviso for redemption of the same premises on payment by the defendant O. S., his heirs, executors, administrators, or assigns, to the plaintiff, his executors, administrators, or assigns, of the sum of 10,000*l.*, with interest for the same in the meantime at the rate of 4*l.* per cent. per annum, on the 25th day of September then next.

2. By an indenture dated the 1st day of April, 1867, made between the defendant O. S. of the one part, and the defendant J. B. of the other part, the defendant O. S. conveyed to the defendant J. B. and his heirs the hereditaments comprised in the hereinbefore stated security of the plaintiff, or some parts thereof, subject to the plaintiff's said security, and subject to a proviso for redemption of the same premises on payment by the defendant O. S., his heirs, executors, administrators, or assigns, to the defendant J. B., his executors, administrators, or assigns, of the sum of 15,000*l.*, with interest for the same in the meantime at the rate of 5*l.* per cent. per annum.

3. The whole of the said sum of 10,000*l.*, with an arrear of interest thereon, remains due to the plaintiff on his said security.

The plaintiff claims as follows:—

1. That an account may be taken of what is due to the plaintiff for principal money and interest on his said security, and that the defendants may be decreed to pay to the plaintiff what shall be found due to him on taking such account,

Act 1875, Appx. C. No. 14.

together with his costs of this action, by a day to be appointed by the Court, the plaintiff being ready and willing, and hereby offering, upon being paid his principal money, interest, and costs, at such appointed time, to convey the said mortgaged premises as the Court shall direct.

2. That in default of such payments the defendants may be foreclosed of the equity of redemption in the mortgaged premises.

3. Such further or other relief as the nature of the case may require.

1876. W. No. 672.

In the High Court of Justice.
Chancery Division.
[*Name of Judge.*]

Between *R. W.*, Plaintiff,
and
O. S. and *J. B.*, Defendants,
(by original action);
And between the said *O. S.*, Plaintiff,
and
The said *R. W.*, and *J. B.*, and *J. W.*, Defendants,
(by counter-claim).

Statement of defence.

The Defence and Counter-claim of the above-named *O. S.*

1. This defendant does not admit that the contents of the indenture of the 25th day of March, 1867, in the plaintiff's statement of complaint mentioned, are correctly stated therein.

2. The indenture of the 1st day of April, 1867, in the statement of claim mentioned, was not a security for the sum of 15,000*l.* and interest at 5*l.* per cent. per annum, but for the sum of 14,000*l.* only, with interest at the rate of 4*l.* 10*s.* per cent. per annum.

3. This defendant submits that under the circumstances in his counterclaim mentioned, the said indentures of the 25th day of March, 1867, and the 1st day of April, 1867, did not create any effectual security upon the mines and minerals in and under the lands in the same indentures comprised, and that the same mines and minerals ought to be treated as excepted out of the said securities.

Counter-claim.

And by way of counter-claim this defendant states as follows:—

1. At the time of the execution of the indenture next hereinafter stated, J. C. A. was seised in fee simple in possession of the lands described in the said indentures, and the mines and minerals in and under the same.

2. By indenture dated the 24th of March, 1860, made between the said J. C. A. of the first part, E. his wife, then E. S., spinster, of the second part, and this defendant and the above-named J. W. of the third part, being a settlement

made in contemplation of the marriage, shortly after solemnized, between the said J. C. A. and his said wife, the said J. C. A. granted to this defendant and the said J. W., and their heirs, all the coal mines, beds of coal, and other the mines and minerals under the said lands, with such powers and privileges as in the now-stating indenture mentioned, for the purpose of winning, working, and getting the same mines and minerals, to hold the same premises to this defendant and the said J. W. and their heirs to the use of the said J. C. A., his heirs and assigns, till the solemnization of the said marriage, and after the solemnization thereof to the use of this defendant and the said J. W., their executors and administrators, for the term of 500 years, from the day of the date of the now stating indenture, upon the trusts therein mentioned, being trusts for the benefit of the said J. C. A., and his wife and the children of their marriage, and from and after the expiration or other determination of the said term of 500 years, and in the meantime subject thereto, to the use of the said J. C. A., his heirs and assigns for ever. Act 1875, Appx. C. No. 14.

3. By indenture dated the 12th day of May, 1860, made between the said J. C. A. of the one part, and W. N. of the other part, the said J. C. A. granted to the said W. N, and his heirs the said lands, except the coal mines, beds of coal, and other mines and minerals thereunder, to hold the same premises unto and to the use of the said W. N., his heirs and assigns for ever, by way of mortgage, for securing the payment to the said W. N., his executors, administrators, or assigns, of the sum of 26,000*l.*, with interest as therein mentioned.

4. On the 14th of January, 1864, the said J. C. A. was adjudicated a bankrupt, and shortly afterwards J. L. was appointed creditor's assignee of his estate.

5. Some time after the said bankruptcy, the said W. N., under a power of sale in his said mortgage deed, contracted with this defendant for the absolute sale to this defendant of the property comprised in his said security for an estate in fee simple in possession, free from incumbrances, for the sum of 26,000*l.*, and the said J. L., as such assignee as aforesaid, agreed to join in the conveyance to this defendant for the purpose of signifying his assent to such sale.

6. By indenture dated the 1st of September, 1866, made between the said W. N. of the first part, the said J. L. of the second part, the said J. C. A. of the third part, and this defendant of the fourth part, reciting the said agreement for sale, and reciting that the said J. L., being satisfied that the said sum of 26,000*l.* was a proper price, had, with the sanction of the Court of Bankruptcy, agreed to confirm the said sale, it was witnessed that in consideration of the sum of 26,000*l.*, with the privity and approbation of the said J. L., paid by this defendant to the said W. N., he the said W. N. granted, and the said J. C. A. ratified and confirmed to this defendant and his heirs, all the hereditaments comprised in the said security of the 12th day of May, 1860, with their rights, members, and appurtenances, and

Act 1875, Appx. C. No. 14.

all the estate, right, title, and interest of them, the said W. N. and J. C. A. therein; to hold the same premises unto and to the use of this defendant, his heirs and assigns for ever.

7. The sale to this defendant was not intended to include anything not included in the security of the 12th of May, 1860, and the said J. L. only concurred therein to signify his approval of the said sale, and did not purport to convey any estate vested in him; and the lastly hereinbefore stated indenture did not vest in this defendant any estate in the said mines and minerals.

8. The plaintiff and the defendant J. B. respectively had before they advanced to this defendant the moneys lent by them on their securities in the plaintiff's claim mentioned, full notice that the mines and minerals under the said lands did not belong to this defendant. This fact appeared on the abstracts of title delivered to them before the preparation of their said securities. A valuation of the property made by a surveyor was furnished to them respectively on behalf of this defendant before they agreed to advance their money on their said securities; but although the said lands are in a mineral district the mines and minerals were omitted from such valuation, and they respectively knew at the time of taking their said securities that the same did not include any interest in the mines and minerals.

9. At the time when the securities of the plaintiff and the defendant J. B. were respectively executed, the plaintiff and the defendant J. B. respectively had notice of the said indenture of settlement of the 24th day of March, 1860.

10. At the time when the plaintiff's security was executed, the mines and minerals under the said lands, with such powers and privileges as aforesaid, were vested in this defendant and the said J. W. for the residue of the said term of 500 years, and subject to the said term, the inheritance in the same mines, minerals, powers and privileges was vested in the said J. L. as such assignee as aforesaid.

11. The said security to the plaintiff was by mistake framed so as to purport to include the mines and minerals under the said lands, and by virtue thereof the legal estate in [one] moiety of the said mines and minerals became and now is vested in the plaintiff for the residue of the said term of 500 years.

The defendant O. S. claims as follows:—

1. That it may be declared that neither the plaintiff nor the defendant J. B. has any charge or lien upon that one undivided moiety, which in manner aforesaid became vested in the plaintiff for the residue of the said term of 500 years, of and in the mines and minerals in and under the lands mentioned in the plaintiff's said security.

2. That it may be declared that the said mines and minerals, rights, and privileges which by the said indenture of settlement were vested in the defendant O. S. and the said J. W.

for the said term of 500 years, upon trust as therein mentioned, ought to be so conveyed and assured as that the same may become vested in the defendant O. S. and the said J. W. for all the residue of the said term upon the trusts of the said settlement.

3. That the said R. W. and J. W. may be decreed to execute all such assurances as may be necessary for giving effect to the declaration secondly hereinbefore prayed.

4. To have such further or other relief as the nature of the case may require.

1876. W. No. 672.

In the High Court of Justice,
Chancery Division.
[*Name of Judge.*]

Between *R. W.*, Plaintiff,
and
O. S. and *J. B.*, Defendants,
(by original action);
And between the said *O. S.*, Plaintiff,
and
The said *R. W.* and *J. B.*, and *J. W.*, Defendants,
(by counter-claim).

The Reply of the Plaintiff, *R. W.* Reply.

1. The Plaintiff joins issue with the defendants upon their several defences; and in reply to the statements alleged by the defendant O. S., by way of counter-claim, the plaintiff says as follows:—

1. The plaintiff does not admit the execution of any such indenture as is stated in the said counter-claim to bear date the 24th of March, 1860.

2. The plaintiff does not admit that the indenture of the 12th of May, 1860, is stated correctly in the statement of [counter-]claim.

3. When the defendant O. S., in the year 1866, applied to the plaintiff to advance him the sum of 10,000*l.*, he offered to the plaintiff as a security the lands which were afterwards comprised in the indenture of the 25th of March, 1867, including the mines and minerals which he now alleges were not to form part of the security, and the plaintiff agreed to lend the said sum upon the security of the said lands, including such mines and minerals. During the negociations for the said loan a valuation of the said property to be included in the mortgage was delivered to the plaintiff on behalf of the said defendant. Such valuation included the mines and minerals; and the plaintiff consented to make the loan on the faith of such valuation. The plaintiff did not know when he took his security that it did not include any interest in the said mines and minerals,

Act 1875, Appx. C. Nos. 14, 15.

on the contrary, he believed that the entirety of such mines and minerals was to be included therein.

4. The plaintiff does not admit the contents of the indenture of the 1st of September, 1866, to be as alleged, or that it was so framed as not to include the said mines and minerals, or that it was not intended to include anything not included in the security of the 12th of May, 1860, or that J. L. in the counter-claim named only concurred therein to signify his approval of the said sale, and did not purport to convey any estate vested in him.

5. Save so far as the plaintiff's solicitor may have had notice by means of the abstract of title that the mines and minerals under the said lands did not belong to the defendant O. S., the plaintiff had not any notice thereof, and he does not admit that it appeared from the abstract of title that such was the case. The mines were not omitted from any valuation delivered to the plaintiff as mentioned in the counter-claim.

6. The plaintiff admits that when he took his security he was aware that there was indorsed on the deed by which the said lands were conveyed by J. C. A. in the counter-claim named a notice of a settlement of 24th March, 1860, but he had no further or other notice thereof, and though his solicitor inquired after such settlement none was ever produced.

7. The plaintiff submits that if it shall appear that no further interest in the said mines and minerals was conveyed to him by his said security than one undivided moiety of a term of 500 years therein, as alleged by the said counter-claim, such interest is effectually included in the plaintiff's said security, and that he is entitled to foreclose the same.

No. 15.

Action for fraud.

Action for Fraud.

187 . B. No.

In the High Court of Justice.
Division.

Writ issued 3rd August, 1876.

Between *A. B.*, Plaintiff,
and
E. F., Defendant.

Statement of claim.

Statement of Claim.

1. In or about March, 1875, the defendant caused to be inserted in the Daily Telegraph Newspaper an advertisement, in which he offered for sale the lease, fixtures, fittings, goodwill, and stock-in-trade of a baker's shop and business, and described the same as an increasing business, and doing 12 sacks a week. The advertisement directed application for particulars to be made to *X. Y.*

2. The plaintiff having seen the advertisement applied to *X. Y.* who placed him in communication with the defendant, and negociations ensued between the plaintiff and the defendant for the sale to the plaintiff of the defendant's bakery at , with the lease, fixtures, fittings, stock-in-trade, and goodwill.

3. In the course of these negociations the defendant repeatedly stated to the plaintiff that the business was a steadily increasing business, and that it was a business of more than 12 sacks a week.

4. On the 5th of April, 1875, the plaintiff, believing the said statements of the defendant to be true, agreed to purchase the said premises from the defendant for 500*l.*, and paid to him a deposit of 200*l.* in respect of the purchase.

5. On the 15th April the purchase was completed, an assignment of the lease executed, and the balance of the purchase money paid. On the same day the plaintiff entered into possession.

6. The plaintiff soon afterwards discovered that at the time of the negociations for the said purchase by him and of the said agreement, and of the completion thereof, the said business was and had long been a declining business, and at each of those times, and for a long time before, it had never been a business of more than 8 sacks a week. And the said premises were not of the value of 500*l.*, or any saleable value whatever.

7. The defendant made the false representations hereinbefore mentioned well knowing them to be false, and fraudulently, with the intention of inducing the plaintiff to make the said purchase on the faith of them.

The plaintiff claims *l.* damages.

[*Title.*]

Statement of Defence.

Statement of defence.

1. The defendant says that at the time when he made the representations mentioned in the third paragraph of the statement of claim and throughout the whole of the transactions between the plaintiff and defendant, and down to the completion of the purchase and the relinquishment by the defendant of the said shop and business to the plaintiff, the said business was an increasing business, and was a business of over twelve sacks a week. And the defendant denies the allegations of the sixth paragraph of the statement of claim.

2. The defendant repeatedly during the negociations told the plaintiff that he must not act upon any statement or representation of his, but must ascertain for himself the extent and value of the said business. And the defendant handed to the plaintiff for this purpose the whole of his books, showing fully and truthfully all the details of the said business, and from which the nature, extent, and value thereof could be fully seen, and those books were examined for that purpose by the plaintiff, and by an accountant on his behalf. And the plaintiff made the purchase in reliance upon his own judgment, and the result of his own inquiries and investigations, and not upon any statement or representation whatever of the defendant.

Act 1875, Appx. C. Nos. 15, 16.

[*Title.*]

The plaintiff joins issue upon the defendant's statement of defence.

Reply.

No. 16.

Action on a Guarantee.

Action on Guarantee.

187 . B. No.

In the High Court of Justice.
Division.

Writ issued 3rd August, 1876.

Between *A. B.* and *C. D.*, Plaintiffs,
and
E. F. and *G. H.*, Defendants.

Statement of claim.

Statement of Claim.

1. The plaintiffs are brewers, carrying on their business, at under the firm of *X. Y. & Co.*

2. In the month of March, 1872, *M. N.* was desirous of entering into the employment of the plaintiffs as a traveller and collector, and was agreed between the plaintiffs and defendants and *M. N.*, that the plaintiffs should employ *M. N.* upon the defendant entering into the guarantee hereinafter mentioned.

3. An agreement in writing was accordingly made and entered into, on or about the 30th March, 1872, between the plaintiffs and the defendants, whereby in consideration that the plaintiffs would employ *M. N.* as their collector the defendants agreed that they would be answerable for the due accounting by *M. N.* to the plaintiffs for and the due payment over by him to the plaintiffs of all moneys which he should receive on their behalf as their collector.

4. The plaintiffs employed *M. N.* as their collector accordingly, and he entered upon the duties of such employment, and continued therein down to the 31st of December, 1873.

5. At various times between the 29th of September and the 25th of December, 1873, *M. N.* received on behalf of the plaintiffs and as their collector sums of money from debtors of the plaintiffs amounting in the whole to the sum of 950*l.*; and of this amount *M. N.* neglected to account for or pay over to the plaintiffs sums amounting in the whole to 227*l.*, and appropriated the last-mentioned sums to his own use.

6. The defendants have not paid the last-mentioned sums, or any part thereof to the plaintiffs.

The plaintiffs claim :—

No. 17.

Interest Suit (Probate).

187 . B. No.

Interest Suit (Probate).

In the High Court of Justice.
Probate Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Statement of Claim.

Statement of claim.

1. *M. N.*, late of No. High Street, Putney, in the county of Surrey, grocer, deceased, died on or about the day of , at No. 1, High Street, Putney, aforesaid, a widower, without child, parent, brother or sister, uncle or aunt, nephew or niece.

2. The plaintiff is the cousin-german, and one of the next of kin of the deceased.

The plaintiff claims :—

That the Court decree to him a grant of letters of administration of the personal estate and effects of the said deceased as his lawful cousin-german, and one of his next of kin.

[*Title.*]

Defence.

Statement of defence.

1. The defendant admits that *M. N.* died a widower, without child, parent, brother or sister, uncle or aunt, or niece, but he denies that he died without nephew.

2. The deceased had a brother named *G. B.*, who died in his lifetime.

3. *G. B.* was married to *E. H.* in the parish church of , in the county of , on the day of , and had issue of such marriage, the defendant, who was born in the month of , and is the nephew and next of kin of the deceased.

The defendant therefore claims :—

That the Court pronounce that he is the nephew and next of kin of the deceased, and as such entitled to a grant of letters of administration of the personal estate and effects of the deceased.

[*Title.*]

Reply.

Reply

1. The plaintiff denies that *G. B.* was married to *E. H.*

2. He also denies that the defendant is the issue of such marriage.

Act 1875, Appx. C. No. 18.

No. 18.

187 . B. No.

In the High Court of Justice.
Division.

Action by Landlord against Tenant.

Writ issued 3rd August, 1876.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Statement of claim.

Statement of Claim.

1. On the day of , the plaintiff, by deed, let to the defendant a house and premises No. 52, Street, in the City of London, for a term of 21 years from the day of , at the yearly rent of 120*l.*, payable quarterly.

2. By the said deed the defendant covenanted to keep the said house and premises in good and tenantable repair.

3. The said deed also contained a clause of re-entry, entitling the plaintiff to re-enter upon the said house and premises, in case the rent thereby reserved whether demanded or not should be in arrear for 21 days, or in case the defendant should make default in the performance of any covenant upon his part to be performed.

4. On the 24th June, 187 , a quarter's rent became due, and on the 29th of September, 187 , another quarter's rent became due; on the 21st October, 187 , both had been in arrear for 21 days, and both are still due.

5. On the same 21st October, 187 , the house and premises were not and are not now in good or tenantable repair, and it would require the expenditure of a large sum of money to reinstate the same in good and tenantable repair, and the plaintiff's reversion is much depreciated in value.

The plaintiff claims:—

1. Possession of the said house and premises.
2. *l.* for arrears of rent.
3. *l.* damages for the defendant's breach of his covenant to repair.
4. *l.* for the occupation of the house and premises from the 29th of September, 187 , to the day of recovering possession.

The plaintiff proposes that this action should be tried in London.

No. 19.

Necessaries for Ship.

187 . No.

In the High Court of Justice.
Admiralty Division.

Action for necessaries for ship.

Writ issued [ ].

The "Enterprise."

Between *A. B.* and *C. D.*, Plaintiffs,
and
E. F. and *G. H.*, Defendants.

Statement of Claim.

Statement of claim.

1. The plaintiffs were at the time hereinafter stated and are engineers and ironfounders, carrying on business at Liverpool, in the county of Lancaster.

2. In the month of January, 1872, whilst the above-named steamship "Enterprise," belonging to the port of London, was in the port of Liverpool, the plaintiffs, having received orders from the master in that behalf, executed certain necessary work to her and supplied her with certain necessary stores and materials, and caused her to be supplied upon their credit with certain necessary work, labour, materials, and necessaries, and thereby supplied the said ship with necessaries within the meaning of the fifth section of the Admiralty Court Act, 1861.

3. There is due to the plaintiffs in respect of such supply of necessaries to the said ship the sum of 577*l.* 2*s.* 6*d.*, and the plaintiffs cannot obtain payment thereof without the assistance of the Court.

The plaintiffs claim :—

1. Judgment pronouncing for the claim of the plaintiffs.
2. The condemnation of the defendants and their bail therein, with costs.
3. A reference, if necessary, of the claim of the plaintiffs to the registrar, assisted by assessors, to report the amount thereof.
4. Such further relief as the nature of the case requires.

[*Title.*]

Defence.

Statement of defence.

1. The defendants deny the allegations contained in the third paragraph of the statement of claim.

2. The defendants admit that the plaintiffs executed certain work to the said ship, and supplied her with certain materials, but they say, that a portion of the work so executed was executed

Act 1875, Appx. C. Nos. 19, 20.

badly and insufficiently, and of the materials so supplied some were bad and insufficient, and a portion of the work in the claim mentioned was done in and about altering and endeavouring to make good such bad and insufficient work and materials. The defendants have paid in respect of the work and materials in the claim mentioned the sum of 356*l.* 17*s.* 9*d.*, and the said sum is sufficient to satisfy the claims of the plaintiffs.

3. The defendants deny the allegations contained in the second paragraph of the claim, so far as they relate to any claim beyond the said sum of 356*l.* 17*s.* 9*d.*, and say that if the plaintiffs did execute any work or did supply any materials other than the work and materials mentioned in the second paragraph of this defence, such work was not necessary work, and such materials were not necessary materials, within the meaning of the fifth section of the Admiralty Court Act, 1861, and were not supplied in such circumstances as to render the defendants liable to pay for the same.

[*Title.*]

Reply.

Reply.

1. The plaintiffs join issue upon the statement of defence.

No. 20.

Action for negligence.

Negligence.

187 . B. No.

In the High Court of Justice.
Division.

Writ issued 3rd August, 1876.

Between *A. B.*, Plaintiff,
and
E. F., Defendant.

Statement of claim.

Statement of Claim.

1. The plaintiff is a shoemaker, carrying on business at . The defendant is a soap and candle manufacturer, of .

2. On the 23rd May, 1875, the plaintiff was walking eastward along the south side of Fleet Street, in the city of London, at about three o'clock in the afternoon. He was obliged to cross Street, which is a street running into Fleet Street at right angles on the south side. While he was crossing this street, and just before he could reach the foot pavement on the further side thereof, a two-horse van of the defendant's, under the charge and control of the defendant's servants, was negligently, suddenly, and without any warning, turned at a rapid and dangerous pace out of Fleet Street into Street. The pole of the van struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken, and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits. Act 1875, Appx. C. Nos. 20, 21.

The plaintiff claims *l.* damages.

[*Title.*]

Statement of Defence. Statement of defence.

1. The defendant denies that the van was the defendant's van, or that it was under the charge or control of the defendant's servant. The van belonged to Mr. John Smith, of , a carman and contractor employed by the defendant to carry and deliver goods for him; and the persons under whose charge and control the said van was were the servants of the said Mr. John Smith.

2. The defendant does not admit that the van was turned out of Fleet Street, either negligently, suddenly, or without warning, or at a rapid or dangerous pace.

3. The defendant says, that the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the van approaching him, and avoided any collision with it.

4. The defendant does not admit the statements of the third paragraph of the statement of claim.

[*Title.*]

Reply. Reply

The plaintiff joins issue upon the defendant's statement of defence.

No. 21.

Possession of Ship. Action for possession of ship (Admiralty).

187 . B. No.

In the High Court of Justice.
Admiralty Division.

Writ issued [ ].

The "Lady of the Lake."

Between *A. B.*, Plaintiff,
and
E. F., Defendant.

Statement of Claim. Statement of claim.

1. On or about the 15th of July, 1868, an agreement was entered into between the plaintiff and *J. D.*, who was then the sole owner

Act 1875, Appx. C. No. 21.

of the abovenamed barque "Lady of the Lake," whereby *J. D.* agreed to sell, and the plaintiff agreed to purchase, 32-64th parts or shares of the vessel for the sum of 500*l.*; payment 300*l.* in cash, and the remainder by purchaser's acceptances at three and six months' date, and it was thereby agreed that the plaintiff was to be commander of the vessel.

2. The plaintiff accordingly paid to *J. D.* the sum of 300*l.*, and gave him his (the plaintiff's) acceptances at three and six months' date for the residue of the said purchase money, and *J. D.* by bill of sale transferred 32-64th parts or shares in the vessel of the plaintiff, which bill of sale was duly registered on the 18th of July, 1868; the plaintiff has since been and still is the registered owner of such 32-64th shares.

3. The vessel then sailed under the plaintiff's command on a voyage from Sunderland to the Brazils and other ports, and then on a homeward voyage to Liverpool, where she arrived on the 18th of June, 1869, and having there discharged her homeward cargo she sailed thence under the plaintiff's command with a cargo to the Tyne, and thence to Sunderland, at which port she arrived on the 9th of August, 1869.

4. The plaintiff then made several ineffectual applications to *J. D.*, with a view to obtaining another charter for the said vessel, and after she had been lying idle for a considerable time, the plaintiff on or about the 16th of September, 1869, obtained an advantageous charter for her to proceed to Barcelona with a cargo of coals, and with a view to enable her to execute such charter the plaintiff paid the dock dues, and moved the vessel into a slipway in order that her bottom might be cleaned, but on or about the 17th of September, whilst the vessel was on shore adjoining the slipway, the defendant, to whom the said *J. D.* had in the meantime transferred his 32-64th parts, forcibly took the vessel out of the possession of the plaintiff, and refused and still refuses to allow the plaintiff to take the vessel on her said voyage to Barcelona, and by reason thereof heavy loss is being occasioned to the plaintiff.

The plaintiff claims:—

1. Judgment giving possession of the vessel "Lady of the Lake" to the plaintiff:
2. The condemnation of the defendant in costs of suit, and in all losses and damages occasioned by the defendant to the plaintiff:
3. Such further relief as the nature of the case requires.

[*Title.*]

Statement of defence.

Defence.

1. The defendant says that the acceptances in the second paragraph of the claim mentioned were respectively dishonoured by the plaintiff, and have never yet been paid by him.

2. It was agreed between the plaintiff and *J. D.*, that *J. D.* should act, and he has since always acted, as ship's husband of the "Lady of the Lake."

3. On the 31st of August, 1869, *J. D.* sold to the defendant, for the sum of 400*l.*, and by bill of sale duly executed transferred to him his 32-64th shares, and the bill of sale was duly registered on the 14th of September following. Act 1875, Appx. C. No. 21.

4. After the "Lady of the Lake" had arrived at Sunderland, and after the defendant had purchased from *J. D.* his 32-64th shares of the "Lady of the Lake," the defendant placed the vessel in the custody and possession of a shipkeeper. The plaintiff, however, unlawfully removed her from such possession, and thereupon the defendant had the vessel taken into the South Dock of the harbour at Sunderland, with orders that she should be kept there. What the defendant did, as in this article mentioned, he did with the consent and full approval of *J. D.*

5. At the time of the sale of the "Lady of the Lake" by *J. D.* to the defendant as afore-mentioned, there was and there still is due from the plaintiff, as part owner of the "Lady of the Lake," to *J. D.*, as part owner and ship's husband, a sum of money exceeding 300*l.* in respect of the vessel and her voyages over and above the amount of the unpaid acceptances.

6. Save as herein appears, the averments in the fourth paragraph of the claim contained are untrue, and if the charter-party mentioned in that paragraph was obtained by the plaintiff as alleged, which the defendant does not admit, it was obtained by him without the authority, consent, or knowledge of *J. D.* or the defendant.

7. Before the defendant took possession of the vessel as aforementioned, the plaintiff ceased to be master of her, with the consent of *J. D.* or the defendant.

8. *J. D.* has instituted an action against the said vessel in , in order to have the accounts taken between him and the plaintiff, and to enforce payment of the money due from the plaintiff to him.

[*Title.*]

Reply. Reply.

1. The plaintiff says in reply to the first paragraph of the defence that the bills therein mentioned were dishonoured by the plaintiff because *J. D.* was indebted to the plaintiff in a large amount for his wages as master, and for his share of the earnings of the "Lady of the Lake," and refused payment thereof.

2. *J. D.* did not place the vessel in the exclusive custody or possession of a shipkeeper as in the fifth paragraph of the defence stated or implied. On the contrary, the vessel continued in the custody and possession of the plaintiff, who still holds her register. A man was sent on board the vessel by *J. D.* to look after *J. D.*'s share in the said vessel while she was in dock, but he did not dispossess the said plaintiff or take exclusive possession of the vessel, and the plaintiff was not dispossessed of the vessel until on or about the 17th of September last.

3. Except as hereinbefore appears the plaintiff joins issue upon the defendant's statement of defence.

Act 1875, Appx. C. Nos. 21, 22.

[*Title.*]

Rejoinder.

The defendant joins issue upon the first and second paragraphs of the Reply.

(4.) Rejoinder.

No. 22.

Action on promissory note.

Promissory Note.

187 . B. No.

In the High Court of Justice.
Division.

Writ issued 3rd August, 1876.

Between *A. B.*, Plaintiff,
and
E. F., Defendant.

(1.) Statement of claim.

Statement of Claim.

1. The defendant on the day of made his promissory note, whereby he promised to pay to the plaintiff or his order *l.* three months after date.

2. The note became due on the day of , 1874, and the defendant has not paid it.

The plaintiff claims :—

The amount of the note and interest thereon to judgment.

The plaintiff proposes that this action should be tried in the county of .

[*Title.*]

(2.) Statement of defence.

Statement of Defence.

1. The defendant made the note sued upon under the following circumstances :—The plaintiff and defendant had for some years been in partnership as coal merchants, and it had been agreed between them that they should dissolve partnership, that the plaintiff should retire from the business, that the defendant should take over the whole of the partnership assets and liabilities, and should pay the plaintiff the value of his share in the assets after deducting the liabilities.

2. The plaintiff thereupon undertook to examine the partnership books, and inquire into the state of the partnership assets and liabilities ; and he did accordingly examine the books, and make the said inquiries, and he thereupon represented to the defendant that the assets of the firm exceeded 10,000*l.*, and that the liabilities of the firm were under 3000*l.*, whereas the fact was that the assets of the firm were less than 5000*l.*, and the liabilities of the firm largely exceeded the assets.

3. The misrepresentations mentioned in the last paragraph induced the defendant to make the note now sued on, and there never was any other consideration for the making of the note.

[*Title.*]

Reply.

The plaintiff joins issue on the defence.

Act 1875, Appx. C. Nos. 22, 23.

(3.) Reply.

No. 23.

Probate of Will.

Action for probate of will in solemn form.

187 . B. No.

In the High Court of Justice.
Probate Division.

Writ issued [ ].

Between *A. B.*, Plaintiff,
and
E. F., Defendant.

Statement of Claim.

(1.) Statement of claim.

1. *C. T.*, late of Bicester, in the county of Oxford, gentleman, deceased, who died on the 20th of January, 1875, at Bicester, being of the age of 21 years, made his last will, with one codicil thereto, the said will bearing date the 1st day of October, 1874, and the said codicil the 1st of January, 1875, and in the said will appointed the plaintiff sole executor thereof.

2. The said will and codicil were signed by the deceased [*or*, by *X. Y.*, in the presence and by the direction of the deceased—*or* signed by the deceased who acknowledged his signature, *or as the case may be*] in the presence of two witnesses present at the same time, the said will in the presence of *H. P.* and *J. R.*, and the said codicil in the presence of *J. D.* and *G. E.*, and who subscribed the same in the presence of the said deceased.

3. The deceased was at the time of the execution of the said will and codicil respectively of sound mind, memory, and understanding.

The plaintiff claims :—

That the Court shall decree probate of the said will and codicil in solemn form of law.

[*Title.*]

Statement of Defence.

(2.) Statement of defence.

The defendant says as follows :—

1. The said will and codicil of the said deceased were not duly executed according to the provisions of the statute 1 Vict. c. 26.

2. The deceased at the time the said will and codicil respectively purport to have been executed was not of sound mind, memory, and understanding.

Act 1875, Appx. C. Nos. 23, 24.

3. The execution of the said will and codicil was obtained by the undue influence of the plaintiff [and others acting with him, whose names are at present unknown to the defendant].

4. The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud, so far as is within the defendant's present knowledge, being [*state the nature of the fraud*].

5. The said deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof, or of the contents of the residuary clause in the said will [*as the case may be*].

6. The deceased made his true last will, dated the 1st day of January, 1873, and in the said will appointed the defendant sole executor thereof. [*Propound this will as in paragraphs two and three of claim.*]

The defendant claims:—

1. That the Court will pronounce against the said will and codicil propounded by the plaintiff:
2. That the Court will decree probate of the said will of the said deceased, dated the 1st day of January, 1873, in solemn form of law.

[*Title.*]

(3.) Reply.

Reply.

1. The plaintiff joins issue upon the statement of defence of the defendant, as contained in the first, second, third, fourth, and fifth paragraphs thereof.

2. The plaintiff says that the said will of the said deceased, dated the 1st of January, 1873, was duly revoked by the will of the said 1st of October, 1873, propounded by the plaintiff in his statement of claim.

No. 24.

Action for recovery of land—landlord and tenant.

Recovery of Land.

187 . B. No.

In the High Court of Justice.
Common Pleas Division.

Writ issued 3rd August 1876.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

(1.) Statement of claim.

Statement of Claim.

1. On the day of the plaintiff let to the defendant a house, No. 52, Street, in the city of London, as tenant from year to year, at the yearly rent of 120*l.*, payable quarterly, the tenancy to commence on the day of

2. The defendant took possession of the house and continued tenant thereof until the day of last, when the tenancy determined by a notice duly given. Act 1875, Appx. C. No. 24.

3. The defendant has disregarded the notice and still retains possession of the house.

The plaintiff claims:—

1. Possession of the house.

2. *l.* for mesne profits from the day of

The plaintiff proposes that this action should be tried in London.

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187 . No.

In the High Court of Justice.
Common Pleas Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant,
(by original action);

And between *C. D.*, Plaintiff,
and
A. B., Defendant,
(by counter claim).

The defence and counter-claim of the above named *C. D.* Statement of defence and counter-claim.

1. Before the determination of the tenancy mentioned in the statement of claim, the Plaintiff *A. B.*, by writing dated the day of , and signed by him, agreed to grant to the defendant *C. D.* a lease of the house mentioned in the statement of claim, at the yearly rent of 150*l.*, for the term of 21 years, commencing from the day of , when the defendant *C. D.*'s tenancy from year to year determined, and the defendant has since that date been and still is in possession of the house under the said agreement.

2. By way of counter-claim the defendant claims to have the agreement specifically performed and to have a lease granted to him accordingly, and for the purpose aforesaid, to have this action transferred to the Chancery division. Counter claim.

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187 . No.

In the High Court of Justice.
Chancery Division.
(Transferred by order dated day of .)

Between *A. B.*, Plaintiff,
and
C. D., Defendant,
(by original action);

And between *C. D.*, Plaintiff,
and
A. B., Defendant,
(by counter-claim).

The reply of the plaintiff *A. B.* Reply.

The plaintiff *A. B.* admits the agreement stated in the defendant *C. D.*'s statement of defence, but he refuses to grant to the

defendant a lease, saying that such agreement provided that the lease should contain a covenant by the defendant to keep the house in good repair and a power of re-entry by the plaintiff upon breach of such covenant, and the plaintiff says that the defendant has not kept the house in good repair, and the same is now in a dilapidated condition.

[*Title.*]

Rejoinder.

Joinder of Issue.

The defendant *C. D.* joins issue upon the plaintiff *A. B.*'s statement in reply.

No. 25.

Action for recovery of land.

Recovery of Land.

187 B. No.

In the High Court of Justice.
Common Pleas Division.

Writ issued 3rd August, 1876.

Between *A. B.* and *C. D.*, Plaintiffs,
and
E. F., Defendant.

Statement of claim.

Statement of Claim.

1. *K. L.*, late of Sevenoaks in the county of Kent, duly executed his last will, dated the 4th day of April 1870, and thereby devised his lands at or near Sevenoaks, and all other his lands in the county of Kent, unto and to the use of the plaintiffs and their heirs, upon the trusts therein mentioned for the benefit of his daughters Margaret and Martha, and appointed the plaintiff executors thereof.

2. *K. L.* died on the 3rd day of January, 1875, and his said will was proved by the plaintiffs in the Court of Probate on or about the 4th day of February, 1875.

3. *K. L.* was at the time of his death seised in fee of a house at Sevenoaks, and two farms near there called respectively , the Home farm containing 276 acres, and the Longton farm containing 700 acres, both in the county of Kent.

4. The defendant, soon after the death of *K. L.*, entered into possession of the house and two farms, and has refused to give them up to the plaintiffs.

The plaintiffs claim:—

1. Possession of the house and two farms:

2. *l.* for mesne profits of the premises from the death of *K. L.* till such possession shall be given.

The plaintiffs propose that this action should be tried in the county of Kent.

[*Title.*]

Act 1875, Appx. C. Nos. 25, 26.

Statement of Defence.

1. The defendant is the eldest son of *I. L.* deceased, who was the eldest son of *K. L.*, in the statement of claim named.

Statement of defence.

2. By articles bearing date the 31st day of May, 1827, and made previous to the marriage of *K. L.* with Martha his intended wife, *K. L.*, in consideration of such intended marriage, agreed to settle the house and two farms in the statement of claim mentioned (and of which he was then seised in fee) to the use of himself for his life, with remainder to the use of his intended wife for her life, and after the survivor's decease, to the use of the heirs of the body of the said *K. L.* on his wife begotten, with other remainders over.

3. The marriage soon after took effect; *K. L.*, by deeds of lease and release, bearing date respectively the 4th and 5th of April, 1828, after reciting the articles in alleged performance of them, conveyed the house and two farms to the use of himself for his life, with remainder to the use of his wife for her life, and after the decease of the survivor of them, to the use of the heirs of the body of *K. L.* on the said Martha to be begotten, with other remainders over.

4. There was issue of the marriage an only son Thomas L., and two daughters. After the death of Thomas L., which took place in February, 1864, *K. L.*, on the 3rd May, 1864, executed a disentailing assurance, which was duly enrolled and thereby conveyed the house and two farms to the use of himself in fee.

[*Title.*]

Reply.

Reply.

The plaintiffs join issue upon the defendant's statement of defence.

See *Gledhill* v. *Hunter*, 14 Ch. D., 492, M.R., for the difference in practice between this and the last cause of action.

No. 26.

Salvage.

Action for salvage (Admiralty).

187 . No.

In the High Court of Justice.
Admiralty Division.

Writ issued [ ].

The "Campanil."

Between *A. B.* and *C. D.*, Plaintiffs,
and
E. F. and *G. H.*, Defendants.

Statement of Claim.

Statement of claim.

1. The "Brazilian" is a screw steamer belonging to the port of Newcastle, of the burthen of 1359 tons gross registered tonnage,

and propelled by engines of 130 horse power, and at the time of the rendering of the salvage services hereinafter mentioned she was navigated by her master and a crew of twenty-four hands. She left the port of Newcastle on the 27th of November, 1873, on a voyage to Genoa, and thence by way of Palmaras and Aguilas to the Tyne, and about 10 a.m. on the 26th of December, 1873, in the course of her homeward voyage, with a cargo of merchandise, she was off the coast of Portugal, the Island of Ons bearing about S.E. by E., when those on board her sighted a disabled steamer about four points on their starboard bow, in-shore, flying signals of distress. A strong gale was blowing at the time, and there was a very heavy sea running.

2. The "Brazilian" at once made towards the disabled steamer, which proved to be the "Campanil," the vessel proceeded against in this action. She was heavily laden with a cargo of iron ore. The "Brazilian" as she approached the "Campanil" signalled to her, and the "Campanil" answered by signal that her engines had broken down. By this time the "Campanil" was heading in-shore, rolling heavily, and shipping a large quantity of water. The "Brazilian" came under the lee of the "Campanil" and asked if she wanted assistance. Her master replied that he wanted to be towed to Vigo as his vessel had lost her screw. The master of the "Brazilian" then asked those on board the "Campanil" to send him a hawser, and for a long time those on board the "Brazilian" made attempts to get a hawser from the "Campanil," and exposed themselves and their vessel to great danger in doing so. The wind and sea rendering it impossible to get the hawser whilst the "Brazilian" was to leeward of the "Campanil," the "Brazilian" went to windward and attempted to float lines by means of life-buoys to the "Campanil." During all this time the "Campanil" was quite unmanageable, and yawed about, and there was very great difficulty in manœuvring the "Brazilian" so as to retain command over her and keep her near the "Campanil." It was necessary to keep constantly altering the engines of the "Brazilian," setting them on ahead and reversing them quickly, and in consequence the engines laboured heavily and were exposed to great danger of being strained.

3. Whilst the "Brazilian" was endeavouring to float lines to the "Campanil," the "Campanil" made a sudden lurch and struck the "Brazilian" on her port quarter, knocking in her port bulwark and rail, and causing other damage to the vessel. After many unsuccessful efforts by those on board the "Brazilian," and after they had lost two life buoys and a quantity of rope, a hawser from the "Campanil" was at length made fast on board the "Brazilian," and the "Brazilian" with the "Campanil" in tow steamed easy ahead. A second hawser was then got out and made fast with coir springs, and the "Brazilian" then commenced to tow full speed ahead, each hawser having a full scope of ninety fathoms.

4. The "Brazilian" made towards Vigo, which was about thirty-five miles distant; the vessels made about two knots an hour, the "Brazilian" keeping her engines going at full speed. The "Brazilian" laboured very heavily, and both vessels shipped large quantities of water.

5. About noon one of the tow ropes broke, and both vessels were in danger of being driven ashore, broken water and rocks appearing to leeward, distant about two miles. After great difficulty the broken hawser was made fast again with a heavy spring of a number of parts of rope, and the "Brazilian" towed ahead under the lee of Ons Island.

6. Shortly afterwards the weather moderated and the sea went down a little, and the "Brazilian" was able to make more way, and about 7 p.m. the same day she towed the "Campanil" into Vigo harbour in safety.

7. The "Brazilian" was compelled to remain in harbour the next day to pay port charges and clear at the Custom House.

8. The coast off which the aforesaid services were rendered is rocky and exceedingly dangerous, and strong currents set along it, and but for the services rendered by the "Brazilian" the "Campanil" must have gone ashore and been wholly lost, together with her cargo, and in all probability her master and crew would have been drowned. No other steamer was in sight, and there was not any other prospect of any other efficient assistance.

9. In rendering the said service the "Brazilian" and those on board her were exposed to great danger. Owing to the heavy sea, and the necessity of towing with a long scope of hawser, there was great danger of fouling the screw of the "Brazilian," and it required constant vigilance on the part of the master and crew to prevent serious accident. The master and crew of the "Brazilian" underwent much extra fatigue and exertion.

10. The damage sustained by the "Brazilian" in rendering the said services amounts to the sum of 150*l.*, and the value of the extra quantity of coal consumed in consequence of the said services is estimated at 16*l.*, and 4*l.* 1*s.* 5*d.* was paid by the owners of the "Brazilian" for harbour dues and other charges at Vigo.

11. The value of the "Campanil," her cargo and freight, at the time of the salvage services, was as follows, that is to say: The "Campanil" was of the value of 13,000*l.*, her cargo was of the value of 300*l.*, and the gross amount of freight payable upon delivery of the cargo laden on board her at Barrow-in-Furness was 675*l.*

12. The value of the "Brazilian," her freight and cargo, was about 25,050*l.*

The plaintiffs claim:—

1. Such an amount of salvage as to the Court may seem just:
2. That the defendants and their bail be condemned in costs:
3. Such further or other relief as the nature of the case may require.

[NOTE.—*The ordinary form is*, "That the defendants and their bail be condemned therein and in costs."]

[*Title.*]

Statement of Defence.

Statement of defence.

1. The defendants say that upon the 22nd of December, 1873, the iron screw steamship "Campanil," of the burden of 660 tons

Act 1875, Appx. C. No. 26.

register gross, propelled by engines of 70 horse power, navigated by David Boughton, her master, and a crew of sixteen hands, left Forman, bound to Barrow-in-Furness, laden with a cargo of iron ore.

2. At about 8 a.m. of the 26th of December, whilst the "Campanil" was prosecuting her voyage, the shaft of her propeller broke outside the stern tube, and she lost her propeller. The "Campanil" was then brought to the wind, which was south by east, blowing fresh, and she proceeded under sail for Vigo, and continued to do so till about 9.30 a.m., when two steamships which had been for some time in sight, and coming to the northward, approached the "Campanil." The ensign of the "Campanil" was hoisted, union up, as a signal to one of such steamships, which afterwards came to the "Campanil" and proved to be the "Brazilian," whose owners, master, and crew are the plaintiffs.

3. The "Brazilian" then signalled the "Campanil" and inquired what was the matter, and was signalled in reply that the "Campanil" had lost her propeller, and required to be towed to Vigo, upon which the "Brazilian" signalled for the rope of the "Campanil," in order to take her in tow. After this the "Brazilian" steamed round the "Campanil" and upon her starboard bow, and in so doing the "Brazilian" came with her port quarter into the starboard bow of the "Campanil" and did her considerable damage.

4. The "Brazilian" then threw a heaving line on board the "Campanil," and one of the "Campanil's" hawsers was attached to the line and hauled on board the "Brazilian," which passed one of her hawsers to the "Campanil" by means of life buoys, and when such hawsers had been secured between the two vessels the "Brazilian" commenced to tow the "Campanil" for Vigo, it being at the time about 10.30 a.m., and Ons Island then bearing about south-east by south, and distant about 15 miles.

5. The "Brazilian" proceeded with the "Campanil" in tow, but owing to the two vessels being laden, and to the small power of the "Brazilian," she was only able to make very slow progress with the "Campanil," and it was not until 6.30 p.m. of the said day that the "Brazilian" arrived at Vigo with the "Campanil," which then came to anchor off the town there.

6. The defendants on the day of tendered to the plaintiffs and have paid into Court the sum of 350*l.* for the services so as aforesaid rendered to the "Campanil" and her said cargo and freight, and offered to pay the costs, and submit that the same is ample and sufficient.

[*Title.*]

Reply.

Reply.

1. The plaintiffs admit the first and second articles of the answer, and they admit that the "Brazilian" came into collision with the "Campanil," and caused slight damage to the "Campanil," but save as aforesaid they join issue upon the statement of defence.

No. 27.

Trespass to Land.

Act 1875 Appx. C. No. 27.

187 . No.

Action of trespass to land.

In the High Court of Justice.
Division.

Writ issued 3rd August, 1876.

Between *A. B.*, Plaintiff,
and
E. F., Defendant.

Statement of Claim.

Statement of claim.

1. The plaintiff was on the 5th March, 1876, and still is the owner and occupier of a farm called Highfield Farm, in the parish of , and county of .

2. A private road, known as Highfield Lane, runs through a portion of the plaintiff's farm. It is bounded upon both sides by fields of the plaintiff's, and is separated therefrom by a hedge and ditch.

3. For a long time prior to the 5th March, 1876, the defendant had wrongfully claimed to use the said road for his horses and carriages on the alleged ground that the same was a public highway, and the plaintiff had frequently warned him that the same was not a public highway, but the plaintiff's private road, and that the defendant must not so use it.

4. On the 5th March, 1876, the defendant came with a cart and horse, and a large number of servants and workmen, and forcibly used the road, and broke down and removed a gate which the plaintiff had caused to be placed across the same.

5. The defendant and his servants and workmen on the same occasion pulled down and damaged the plaintiff's hedge and ditch upon each side of the road, and went upon the plaintiff's field beyond the hedge and ditch, and injured the crops there growing, and dug up and injured the soil of the road; and in any case the acts mentioned in this paragraph were wholly unnecessary for the assertion of the defendant's alleged right to use, or the user of the said road as a highway.

The plaintiff claims:—

1. Damages for the wrongs complained of:
2. An injunction restraining the defendant from any repetition of any of the acts complained of:
3. Such further relief as the nature of the case may require.

[*Title.*]

Statement of Defence.

Statement of defence.

1. The defendant says that the road was and is a public highway for horses and carriages; and a few days before the 5th

Act 1875, Appx. C. Nos. 27—29.

March, 1876, the plaintiff wrongfully erected the gate across the road for the purpose of obstructing and preventing, and it did obstruct and prevent the use of the road as a highway. And the defendant on the said 5th March, 1876, caused the said gate to be removed, in order to enable him lawfully to use the road by his horses and carriages as a highway.

2. The defendant denies the allegations of the fifth paragraph of the statement of claim, and says that neither he nor any of his workmen or servants did any act, or used any violence other than was necessary to enable the plaintiff lawfully to use the highway.

[*Title.*]

Reply.

Reply.

The plaintiff joins issue upon the defendant's statement of defence.

No. 28.

Form of demurrer.

18 . No. .

In the High Court of Justice.
Division.

A. B. v. *C. D.*

The defendant [plaintiff] demurs to the [plaintiff's statement of complaint, *or* defendant's statement of defence, *or* of set-off, *or* of counter-claim], [*or* to so much of the plaintiff's statement of complaint as claims . . . . . , *or* as alleges as a breach of contract the matters mentioned in paragraph seventeen, *or as the case may be*], and says that the same is bad in law on the ground that [*here state a ground of demurrer*] and on other grounds, sufficient in law to sustain this demurrer.

This form is prescribed by O. XXVIII., r. 2, *ante*, p. 279.

As to demurrers generally, and the practice relating thereto, under the Judicature Acts, see O. XXVIII., *ante*, pp. 278 to 282, and notes thereto.

No. 29.

Entry of Demurrer.

Memorandum of entry of demurrer for argument.

1874. B. No.

In the High Court of Justice.
Division.

A. B. v. *C. D.*

Enter for the argument the demurrer of to

X. Y.,
Solicitor for the plaintiff [*or, &c.*].

This form is prescribed by O. XXVIII., r. 13, *ante*, p. 282.

And see note to Form 28, *supra*.

APPENDIX (D).

FORMS OF JUDGMENT (*a*).

No. 1.

1. Default of appearance and defence in case of liquidated demand.

1876. B. No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D. and *E. F.*, Defendants.

30th November, 1876.

The defendants [*or* the defendant *C. D.*] not having appeared to the writ of summons herein [*or* not having delivered any statement of defence], it is this day adjudged that the plaintiff recover against the said defendant *l.*, and costs, to be taxed.

See note (*a*), *infra*.

As to judgment in this case, see O. XIII., rr. 5 and 5a, *ante*, pp. 217, 218.

No. 2.

[*Title, &c.*]

2. Judgment in default of appearance in action for recovery of land.

30th November, 1876.

No appearance having been entered to the writ of summons herein, it is this day adjudged that the plaintiff recover possession of the land in the said writ mentioned.

See note (*a*), *infra*.

As to judgment in this case, see O. XIII., rr. 7, 8, *ante*, p. 219.

No. 3.

3. Judgment in default of appearance and defence after assessment of damages.

1876. B. No.

In the High Court of Justice.
Division.

Between *A. B.* and *C. D.*, Plaintiffs,
and
E. F. and *G. H.*, Defendants.

30th November, 1876.

The defendants not having appeared to the writ of summons herein [*or* not having delivered a statement of defence], and a writ

(*a*) The forms in this Appendix are prescribed by O. XLI., r. 1, *ante*, p. 280, and by O. LX., r. 12, *ante*.

As to when judgment may be entered, and in what form, see O. XLI. *ante*, p. 361, and notes thereto; and note to O. XL., r. 1, *ante*, p. 354.

Act 1875, Appx. D. Nos. 3—5.

of inquiry, dated 1876, having been issued directed to the sheriff of to assess the damages which the plaintiff was entitled to recover, and the said sheriff having by his return dated the 1876, returned that the said damages have been assessed at *l.*, it is adjudged that the plaintiff recover *l.* and costs to be taxed.

As to judgment in this case, see O. XIII., r. 6, *ante*, p. 218. For forms of interlocutory judgment, and of judgment after assessment of damages, in use in the Chancery Division, see Seton on Decrees, pp. 7, 8, ed. 4.

No. 4.

4. Judgment at trial by judge without a jury.

[*Year, letter, and number.*]

Division.

[*If in Chancery Division, name of Judge.*]

day of , 18 .

Between *A. B.*, Plaintiff,

and

C. D., *E. F.*, and *G. H.*, Defendants.

This action coming on for trial [the day of and] this day, before in the presence of counsel for the plaintiff and the defendants [*or, if some of the Defendants do not appear*, for the plaintiff and the defendant *C. D.*, no one appearing for the defendants *E. F.* and *G. H.*, although they were duly served with notice of trial as by the affidavit of filed the day of appears], upon hearing the probate of the will of , the answers of the defendants *C. D.*, *E. F.*, and *G. H.*, to interrogatories, the admission in writing, dated and signed by [Mr. the solicitor for] the plaintiff *A. B.* and by [Mr. the solicitor for] the defendant *C. D.*, the affidavit of filed the day of , the affidavit of filed the day of , the evidence of taken on their oral examination at the trial, and an exhibit marked X, being an indenture dated, &c., and made between [*parties*], and what was alleged by counsel on both sides: This Court doth declare, &c.

And this Court doth order and adjudge, &c.

As to the entry of judgment at or after the trial, see O. XXXVI., 22a, *ante*, p. 327.

No. 5.

5. Judgment after trial by a jury.

[*Title, &c.*]

15th November, 1876.

The action having on the 12th and 13th November, 1876, been tried before the Honourable Mr. Justice , and a special jury of the county of , and the jury having found [*state findings as in officer's certificate*], and the said Mr. Justice having ordered that judgment be entered for

the plaintiff for *l.* and costs of suit [*or as the case may be*]: Therefore it is adjudged that the plaintiff recover against the defendant *l.* and *l.* for his costs of suit [*or* that the plaintiff recover nothing against the defendant, and that the defendant recover against the plaintiff *l.* for his costs of defence, *or as the case may be*]. Act 1875, Appx. D. Nos. 5—7.

See notes to Form No. 4, *ante*, p. 543.

No. 6.

[*Title, &c.*]

6. Judgment after trial before referee.

30th November, 1876.

The action having on the 27th November, 1876, been tried before *X. Y.*, Esq., an official [*or* special] referee; and the said *X. Y.* having found [*state substance of referee's certificate*], it is this day adjudged that

This form is misleading, as a referee has no power to try an action, but only the issues therein. See note to s. 57 of the Act of 1873, *ante*, p. 63. The next form is correct.

No. 6a.

18 . No.

6a. Judgment after trial of questions of account by referee.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

The day of , 18 .

The questions of account in this action having been referred to , and he having found that there is due from the to the the sum of *l.*, and directed that the do pay the costs of the reference : It is this day adjudged that the recover against the said *l.* and costs to be taxed.

The above costs have been taxed and allowed at *l.*, as appears by a Master's Certificate dated the day of , 18 .

See note to last form.

No. 7.

[*Title, &c.*]

7. Judgment upon motion for judgment.

30th November, 1876.

This day before Mr. *X.* of counsel for the plaintiff [*or as the case may be*], moved on behalf of the said [*state judgment moved for*], and the said Mr. *X.* having been heard of counsel for and Mr. *Y.* of counsel for , the Court adjudged

As to motions for judgment, see O. XL., *ante*, p. 354.

Act 1875, Appx. D. Nos. 8—10.

No. 8.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

8. Interlocutory judgment in default of appearance or defence where demand unliquidated.

The day of , 18 .

No [appearance having been entered to the writ of summons statement of defence or demurrer having been delivered by the defendant] herein: It is this day adjudged that the plaintiff recover against the defendant [the value of the goods *or* damages, *or both, as the case may be*] to be assessed.

See O. XIII. r. 6, *ante*, p. 218.

No. 9.

18 . No.

9. Judgment after appearance and order under Order XIV. Rule 1a.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

The day of , 18 .

The defendant having appeared to the writ of summons herein, and the plaintiff having by the order of , dated the day of , 18 , obtained leave to sign judgment under the Rules of the Supreme Court, Order XIV., Rule 1a, for [*recite order*]: It is this day adjudged that the plaintiff recover against the defendant *l.* and costs to be taxed.

The above costs have been taxed and allowed at *l.*, as appears by a Master's Certificate dated the day of , 18 .

No. 10.

18 . No.

10. Judgment after trial by court without jury.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

This action having on the day of 18 been tried before , and the said on the day of , 18 , having ordered that judgment be entered for the for *l.*: It is this day adjudged that the recover from the *l.* and costs to be taxed.

The above costs have been taxed and allowed at *l.*, as appears by a Master's Certificate dated the day of , 18 .

Judgment entered the day of 18 .

No. 11.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

11. Judgment in pursuance of order.

Pursuant to the Order of , dated , 18 , whereby it was ordered and default having been made : It is this day adjudged that the plaintiff recover against the said defendant *l.* and costs to be taxed.

The above costs have been taxed and allowed at *l.*, as appears by a Master's Certificate dated the day of , 18 .

No. 12.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

12. Judgment on certificate of Registrar of county court.

The day of 18 .

This action having been ordered under section 26 of the County Court Act, 1856 (19 & 20 Vict. c. 108), to be tried in the county court of , and the registrar of that court having certified that the result was : It is this day adjudged that recover against *l.* and costs to be taxed.

The above costs have been taxed and allowed at *l.*, as appears by a Master's Certificate dated the day of , 18 .

See the County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 26, and note to s. 67 of the Act of 1873, *ante*, p. 68. No motion for judgment required. *Scutt* v. *Freeman*, 2 Q. B. D. 177.

No. 13.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

13. Judgment for defendant's costs on discontinuance.

The day of , 18 .

The plaintiff having by a notice in writing dated the day of , 18 , [wholly discontinued this action, *or* withdrawn his claim in this action for, *or* withdrawn so much of his claim in this action as relates to , *or as the case may be*];

Act 1875, Appx. i. Nos. 18, 19.

No. 18.

18. Judgment on motion after trial of issue.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

[*Date of Order of Court.*] The day of 18 .

[Issues *or* Questions.] The of fact arising in this action by the order dated the day of ordered to be tried before having on the day of been tried before , and the having found ; Now on motion before the Court for judgment on behalf of the , the Court having ; it is this day adjudged that the recover against the the sum of *l.* and costs to be taxed.

The above costs have been taxed and allowed at *l.*, as appears by a Master's Certificate dated the day of , 18 .

Judgment entered the day of , 18 .

See O. XXXVI., r. 29, *ante*, p. 330.

No. 19.

19. Judgment on motion generally.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

[*Date of Order of Court.*] The day of , 18 .

This action having on the day of , 18 come on before the Court on motion for judgment on behalf of the , and the Court after hearing counsel for the having ordered that [*as in order of Court*]; it is this day adjudged that the recover against the the sum of *l.* and costs to be taxed.

The above costs have been taxed and allowed at *l.*, as appears by a Master's Certificate dated the day of , 18 .

Judgment entered the day of , 18

See O. XL., r. 1, *ante*, p. 354.

Act 1875, Appx. E. Nos. 1, 2.

APPENDIX (E.)

PRÆCIPES OF WRITS OF EXECUTION (a).

FORMS OF PRÆCIPE. PRÆCIPES.

No. 1.

1876. B. No. 1.
Fieri facias.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D. and others, Defendants.

Seal a writ of fieri facias directed to the sheriff of to levy against *C. D.* the sum of *l.* and interest thereon at the rate of *l.* per centum per annum from the day of [and *l.* costs] to .

Judgment [*or* order] dated day of .
[Taxing master's certificate, dated day of .]
X. Y., solicitor for [*party on whose behalf writ is to issue*].

See note (a), *infra*; and O. XLIII., r. 1, *ante*, p. 371.
For the form of this writ, see *post*, p. 559, No. 1.

No. 2.

187 . B. No. 2.
Elegit.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D. and others, Defendants.

Seal a writ of elegit directed to the sheriff of against of in the county of for not paying to *A. B.* the sum of *l.*, together with interest thereon, from the day of [and the sum of *l.* for costs, with interest thereon at the rate of 4*l.* per centum per annum].

Judgment [*or* order] dated day of 18 .
[Taxing master's certificate, dated day of 18].
X. Y.,
Solicitor for .

See O. XLIII., r. 1, *ante*, p. 371.
For the form of this writ, see *post*, p. 561, No. 2.

(a) The forms in this Appendix are prescribed by O. XL., r. 10.
As to execution generally, see O. XLII., ante, pp. 360 *et seq.*, and notes thereto.

Act 1875, Appx. E. Nos. 3—5.

No. 3.

187 . B. No.

In the High Court of Justice.
Division.

3. Venditioni exponas.

Between *A. B.*, Plaintiff,
and
C. D. and others, Defendants.

Seal a writ of venditioni exponas directed to the sheriff of to sell the goods and of *C. D.* taken under a writ of fieri facias in this action tested day of .

X. Y.,
Solicitor of .

See O. XLIII., r. 2, *ante*, p. 371.
For the form of this writ, see *post*, p. 562, No. 3.

No. 4.

187 . B. No.

4. Fieri facias de bonis ecclesiasticis.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Seal a writ of fieri facias de bonis ecclesiasticis directed to the bishop [*or* archbishop *as the case may be*] of to levy against *C. D.* the sum of *l.*

Judgment [*or* order] dated day of .

[Taxing master's certificate, dated day of .]

X. Y.,
Solicitor for .

See O. XLIII., r. 2, *ante*, p. 371.
For the form of this writ, see *post*, pp. 563, 564, Nos. 4, 5.

No. 5.

187 . B. No.

5. Sequestrari facias de bonis ecclesiasticis.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D. and others, Defendants.

Seal a writ of sequestrari facias directed to the Lord Bishop of against *C. D.* for not paying to *A. B.* the sum of *l.*

See O. XLIII., r. 2, *ante*, p. 371.
For the form of this writ, see *post*, p. 564, No. 6.

No. 6.

18 . B. No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D. and others, Defendants.

6. Writ of sequestration.

Seal a writ of sequestration against *C. D.* for not at the suit of *A. B.* directed to [*names of commissioners*].
Order dated day of .

See O. XLVII., *ante*, p. 382.
For the form of this writ, see *post*, p. 567, No. 10.

No. 7.

187 . B. No.

In the High Court of Justice.
Division.

7. Writ of possession.

Between *A. B.*, Plaintiff,
and
C. D. and others, Defendants.

Seal a writ of possession directed to the sheriff of to deliver possession to *A. B.*, of .
Judgment dated day of .

See O. XLVIII., *ante*, p. 383.
For the form of this writ, see *post*, p. 565, No. 7.

No. 8.

187 . B. No.

In the High Court of Justice.
Division.

8. Writ of delivery.

Between *A. B.*, Plaintiff,
and
C. D. and others, Defendants.

Seal a writ of delivery directed to the sheriff of to make delivery to *A. B.*, of .

See O. XLIX., *ante*, p. 384.
For the form of this writ, see *post*, p. 565, No. 8.

No. 9.

187 . B. No.

In the High Court of Justice.
Division.

9. Writ of attachment.

Between *A. B.*, Plaintiff,
and
C. D. and others, Defendants.

Seal in pursuance of order dated day of ,

Act 1875, Appx. E. Nos. 9—12.

an attachment directed to the sheriff of against *C. D.* for not delivering to *A. B.*

See O. XLIV., *ante*, p. 371.
For the form of this writ, see *post*, p. 566, No. 9.

No. 10.

10. Distringas against ex-sheriff.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Seal a writ of distringas nuper vicecomitem quod venditioni exponat, directed to the sheriff of , to sell the goods and of , taken under a writ of fieri facias in this action tested the day of 18 .

Dated the day of , 18 .

(Signed)
(Address)
Solicitor for the

No. 11.

11. Inquiry.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Seal a writ of inquiry directed to the sheriff of to assess the damages in this action.

Judgment dated

Dated the day of , 18 .

(Signed)
(Address)
Solicitor for the

No. 12.

12. Certiorari.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Seal in pursuance of order dated a writ of certiorari directed to .

Dated the day of , 18 .

(Signed)
(Address)
Solicitor for the

Act 1875, Appx. E. Nos. 13—15.

No. 13.

18 . No.

In the High Court of Justice.
Division.

In the matter of a certain now depending in the Court.
Between *A. B.*, Plaintiff,
and
C. D., Defendant.

13. Prohibition.

Seal a writ of prohibition directed to the judge of the above-named Court and to the above-named plaintiff to prohibit them from further proceeding in the said , 18 .

Dated the day of , 18 .

(Signed)
(Address)
Solicitor for the

No. 14.

18 . No.

14. Mandamus.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Seal in pursuance of order dated a writ of mandamus directed to commanding to returnable .

Dated the day of , 18 .

(Signed)
(Address)
Solicitor for the

No. 15.

18 . No.

15. Habeas Corpus ad testificandum.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Seal in pursuance of order dated a writ of habeas corpus ad testificandum directed to the to bring before .

Dated the day of , 18 .

(Signed)
(Address)
Solicitor for the

Act 1875, Appx. D. Nos. 13—15.

it is this day adjudged that the defendant recover against the plaintiff costs to be taxed.

The above costs have been taxed and allowed at *l.*, as appears by a Master's Certificate dated the day of 18 .

See O. XXIII., r. 1, *ante*, p. 271.

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14. Judgment for plaintiff's costs after confession of defence.

No. 14.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

The day of , 18 .

The defendant in his statement of defence herein having alleged a ground of defence which arose after the commencement of this action, and the plaintiff having on the day of , 18 , delivered a confession of that defence; it is this day adjudged that the plaintiff recover against the defendant costs to be taxed.

The above costs have been taxed and allowed at *l.*, as appears by a Master's Certificate dated the day of , 18 .

See O. XX., r. 3, *ante*, p. 263.

No. 15.

15. Judgment for costs after acceptance of money paid into court.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

The day of , 18 .

The defendant having paid into court in this action the sum of *l.* in satisfaction of the plaintiff's claim, and the plaintiff having by his notice dated the day of , 18 , accepted that sum in satisfaction of his entire cause of action, and the plaintiff's costs herein having been taxed, and the defendant not having paid the same within forty-eight hours after the said taxation; it is this day adjudged that the plaintiff recover against the defendant costs to be taxed.

The above costs have been taxed and allowed at *l.*, as appears by a Master's Certificate dated the day of , 18 .

See O. XXX., r. 4, *ante*, p. 289.

No. 16.

16. Judgment where no judgment entered at trial by jury.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

[*Date of Order of Court.*] The day of 18 .

This action having on the day of , 18 , been tried before and a jury of the of, and the jury having found , and the not having thought fit to order any judgment to be entered, Now on motion before the Court for judgment on behalf of the , the Court having ; it is this day adjudged that the recover against the the sum of *l.* and costs to be taxed.

The above costs have been taxed and allowed at *l.*, as appears by a Master's Certificate dated the day of , 18 .

Judgment entered the day of , 18

See O. XXXVI., r. 22a, *ante*, p. 327.

No. 17.

17. Judgment after motion on leave reserved.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

[*Date of Order of Court.*] The day of 18

This action having on the day of , 18 , been tried before and a jury of the of , and the jury having found , and having ordered that judgment be entered for , subject to leave to the to move to set aside the judgment Now on motion before the Court for judgment on behalf of the , the Court having ; it is this day adjudged that the said judgment [do stand *or* be set aside, and that the recover against the the sum of *l.* and costs to be taxed.]

The above costs have been taxed and allowed at *l.*, as appears by a Master's Certificate dated the day of , 18 .

Judgment entered the day of , 18

See O. XXXVI., r. 25, *ante*, p. 329.

Act 1875, Appx. E. Nos. 22—24.

No. 22.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

22. Entry of appearance for defendant.

Enter an appearance for the defendant in this action.
The said defendant limits his defence to part only of the property mentioned in the writ of summons, namely, to

The address of is

Dated the day of .

(Signed)
of [*if this address be beyond three miles from the Royal Courts of Justice, an address for service within three miles thereof must be given*].
Agent for
of

The said defendant require a statement of claim to be delivered.

No. 23.

18 . No.

23. Entry of appearance.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Enter an appearance for in this action

Dated the day of , 18 .

(Signed)
of [*if this address be beyond three miles from the Royal Courts of Justice, an address for service within three miles thereof must be given*].
Agent for
of

The said defendant require a statement of claim to be delivered.

No. 24.

18 . No.

24. Entry of appearance, Order XVI., rule 18.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Enter an appearance for to the notice issued in this action on the day of , 18 , by the defendant .

under the Rules of the Supreme Court, Order XVI., Rule 18 . Act 1875, Appx. E. Nos. 24—27.

Dated the day of , 18 .

(Signed)
of [*if this address be beyond three miles from the Royal Courts of Justice, an address for service within three miles thereof must be given.*]
Agent for
of

The said defendant require a statement of claim to be delivered.

No. 25.

18 . No. 25. Entry of appearance to counter-claim.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Enter an appearance for to the counter-claim of the above-named defendant in this action.

Dated the day of , 18 .

(Signed)
of [*if this address be beyond three miles from the Royal Courts of Justice, an address for service within three miles thereof must be given*].
Agent for
of

No. 26.

18 . No. 26. Entry of action for trial.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff.
and
C. D., Defendant.

Enter this action for trial.

Dated the day of , 18 .

(Signed)
(Address)

No. 27.

18 . No. 27. Entry of appeal.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Enter this appeal from the order [*or* judgment] of in this action, dated the day of , 18 .

Dated the day of , 18 .

(Signed)
(Address)

No. 28.

28. [illegible]

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Enter for argument the demurrer of to the in this action.

Dated the day of , 18 .
(Signed)
(Address)

No. 29.

29. [illegible]

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Set down for argument .

Dated the day of , 18 .
(Signed)
(Address)

No. 30.

30. Entry of special case.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Set down the , dated the day of , 18 , of Mr. , the referee in this for hearing as a special case.

Dated the day of , 18 .
(Signed)
(Address)

No. 31.

31. Memorandum of service of notice of judgment.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Enter memorandum of service of notice of judgment made in

this action, and dated the day of , 18 . Act 1875, Appx. E. Nos. 31, 32.
on the under-mentioned persons, viz. :—

Name of Party served.	Date of Service.

Dated the day of , 18 .
(Signed)
(Address)

No. 32. 32. Search.

18 . No.

In the High Court of Justice.
Division.

v.

Search for

Dated the day of , 18 .
(Signed)
(Address)
Agent for
Solicitor for

APPENDIX (F).

Sup. 418. Appendix F.

WRITS OF EXECUTION (*a*).

Writs of Execution.

Forms of Writs.

No. 1.

Fi. Fa.

187 . B. No. 1. Writ of fieri facias.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff.
and
C. D. and others, Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the sheriff of greeting.

We command you that of the goods and chattels of *C. D.* in

(*a*) The forms in this Appendix are prescribed by O. XLII., r. 12, and by O. LX., r. 52.
As to execution generally, see O. XLII., *ante*, pp. 360 *et seq.* and notes thereto.

Act 1875, Appx. F. Nos. 1, 1a.

your bailiwick you cause to be made the sum of *l.* and also interest thereon at the rate of *l.* per centum per annum from the day of [*day of the judgment or order, or day on which money directed to be paid or day from which interest is directed by the order to run, as the case may be*] which said sum of money and interest were lately before us in our High Court of Justice in a certain action [*or* certain actions, *as the case may be*] wherein *A. B.* is plaintiff and *C. D.* and others are defendants [*or* in a certain matter there depending intituled "In the matter of *E. F.*," *as the case may be*] by a judgment [*or* order, *as the case may be*] of our said Court, bearing date the day of , adjudged [*or* ordered, *as the case may be*] to be paid by the said *C. D.* to *A. B.*, together with certain costs in the said judgment [*or* order *as the case may be*] mentioned, and which costs have been taxed and allowed by one of the taxing masters of our said Court at the sum of *l.* as appears by the certificate of the said taxing master, dated the day of . And that of the goods and chattels of the said *C. D.* in your bailiwick you further cause to be made the said sum of *l.* [*costs*], together with interest thereon at the rate of 4*l.* per centum per annum from the day of [*the date of the certificate of taxation. The writ* must *be so moulded as to follow the substance of the judgment or order*], and that you have that money and interest before us in our said Court immediately after the execution hereof to be paid to the said *A. B.* in pursuance of the said judgment [*or* order *as the case may be*]. And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution thereof. And have there then this writ.

Witness, &c.

Interest on costs runs from the date of taxing of the taxing master's certificate: *Schrœder* v. *Clough*, 35 L. T. 850.

See note (*a*), *supra*.
For form of præcipe, see *ante*, p. 549, No. 1,
As to this writ, see also O. XLIII., r. 1, *ante*, p. 370.

No. 1a.

(1a.) Fieri facias on order for costs.

Fi. Fa. for Costs.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the sheriff of greeting.

We command you, that of the goods and chattels of in your bailiwick you cause to be made the sum of for certain costs which by an order of Our High Court of Justice dated the day of , 18 , were ordered to be paid by the said to and which have been

taxed and allowed at the said sum, and interest on the said sum at the rate of 4*l.* per centum per annum from the day of , 18 , and that you have the said sum and interest before us in our said Court, immediately after the execution hereof, to be rendered to the said . And in what manner you shall have executed this our writ make appear to us immediately after the execution hereof. And have there then this writ. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of 18 . Levy *l.* and *l.* for costs of execution, &c., and also interest on *l.* at 4*l.* per centum per annum from the day of , 18 , until payment; besides sheriff's poundage, officers' fees, costs of levying, and all other legal incidental expenses. Act 1875, Appx. F. Nos. 1a, 2.

This writ was issued by of , agent for of , solicitor for the .

The is a , and resides at at in your bailiwick.

No. 2.

Elegit.

187 . B. No. 2. Writ of Elegit.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D. and others, Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the sheriff of greeting.

Whereas lately in our High Court of Justice in a certain action [*or* certain actions, *as the case may be*] there depending, wherein *A. B.* is plaintiff and *C. D.* and others are defendants [*or* in a certain matter there depending, intituled "In the matter of *E. F.*," *as the case may be*] by a judgment [*or* order, *as the case may be*] of our said Court made in the said action [*or* matter, *as the case may be*], and bearing date the day of , it was adjudged [*or* ordered, *as the case may be*] that *C. D.* should pay unto *A. B.* the sum of *l.*, together with interest thereon after the rate of *l.* per centum per annum from the day of , together also with certain costs as in the said judgment [*or* order, *as the case may be*] mentioned, and which costs have been taxed and allowed by , one of the taxing masters of our said Court, at the sum of *l.* as appears by the certificate of the said taxing master, dated the day of . And afterwards the said *A. B.* came into our said Court, and according to the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick as the said *C. D.*, or any one in trust for him, was seised or possessed of on the day of in the year of our Lord

Act 1875, Appx. F. Nos. 2, 3.

[the day on which the judgment or order was made] or at any time afterwards, or over which the said *C. D.* on the said day of or at any time afterwards had any disposing power which he might without the assent of any other person exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof to him and to his assigns, until the said two several sums of *l.* and *l.*, together with interest upon the said sum of *l.*, at the rate of *l.* per centum per annum from the said day of and on the said sum of *l.* (*costs*) at the rate of 4*l.* per centum per annum from the day of shall have been levied. Therefore we command you that without delay you cause to be delivered to the said *A. B.* by a reasonable price and extent all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands and tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick as the said *C. D.*, or any person or persons in trust for him, was or were seised or possessed of on the said day of [the day on which the decree or order was made] or at any time afterwards, or over which the said *C. D.* on the said day of [the day on which the decree or order was made] or at any time afterwards had any disposing power which he might without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said *A. B.* as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns until the said two several sums of *l.* and *l.* together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us in our Court aforesaid, immediately after the execution thereof, under your seals, and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

Witness ourselves [ourself] at Westminster, &c.

As to this writ, see also O. XLIII., r. 1, *ante*, p. 383.
For form of præcipe, see *ante*, p. 549, No. 2.

No. 3.

Venditioni Exponas.

3. Writ of venditioni exponas.

1875. B. No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D. and others, Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the sheriff of greeting.

Whereas by our writ we lately commanded you that of the goods and chattels of *C. D.* [*here recite the fieri facias to the end*].

And on the day of you returned to us in the Division of our High Court of Justice aforesaid, that by virtue of the said writ to you directed you had taken goods and chattels of the said *C. D.*, to the value of the money and interest aforesaid, which said goods and chattels remained in your hands unsold for want of buyers. Therefore, we being desirous that the said *A. B.* should be satisfied his money and interest aforesaid, command you that you expose to sale and sell, or cause to be sold, the goods and chattels of the said *C. D.*, by you in form aforesaid taken, and every part thereof, for the best price that can be gotten for the same, and have the money arising from such sale before us in our said Court of Justice immediately after the execution hereof, to be paid to the said *A. B.* And have there then this writ.

Witness ourself at Westminster, the day of in the year of our reign.

As to this writ, see also O. XLIII. r. 2, *ante*, p. 371.
For form of præcipe, see *ante*, p. 550, No. 3.

No. 4.

Fi. fa. de bonis ecclesiasticis.

4. Writ of fieri facias de bonis ecclesiasticis.

1875. B. No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D. and others, Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To the Right Reverend Father in God [John] by Divine permission Lord Bishop of greeting: We command you, that of the ecclesiastical goods of *C. D.*, clerk in your diocese, you cause to be made *l.* which lately before us in our High Court of Justice in a certain action [*or* certain actions, *as the case may be*] wherein *A. B.* is plaintiff and *C. D.* is defendant [*or* in a certain matter there depending, intituled "In the matter of *E. F.*," *as the case may be*], by a judgment [*or* order, *as the case may be*] of our said Court bearing date the day of , was adjudged [*or* ordered, *as the case may be*] to be paid by the said *C. D.* to the said *A. B.*, together with interest on the said sum of at the rate of *l.* per centum per annum, from the day of , and have that money, together with such interest as aforesaid before us in our said Court immediately after the execution hereof, to be rendered to the said *A. B.*, for that our sheriff of returned to us in our said Court on [*or* "at a day now past"] that the said *C. D.* had not any goods or chattels or any lay fee in his bailiwick whereof he could cause to be made the said *l.* and interest aforesaid or any part thereof and that the said *C. D.* was a beneficed clerk (to wit) rector of rectory [*or* vicar of the vicarage] and parish church of , in the said sheriff's county, and within your diocese [*as in the return*], and in what manner you shall have executed this our writ make appear to us in our said Court imme-

Act 1875, Appx. F. Nos. 4—6.

diately after the execution hereof, and have you there then this writ. Witness ourself at Westminster, the day of , in the year of our Lord .

As to this writ, see O. XLIII., r. 2, *ante*, p. 371.
For form of præcipe, see *ante*, p. 550, No. 4.

No. 5.

Fi. Fa.

5. Writ of fieri facias to the Archbishop de bonis ecclesiasticis during the vacancy of a bishop's see.

Victoria [&c. *as in the preceding form*]: To the Right Reverend Father in God [John] by Divine Providence Lord Archbishop of Canterbury, Primate of all England and Metropolitan, greeting: We command you, that of the ecclesiastical goods of *C. D.*, clerk in the diocese of , which is within the province of Canterbury, as ordinary of that church, the episcopal see of now being vacant, you cause to be made [&c., *conclude as in the preceding form.*]

See notes to form No. 4, *supra*.

No. 6.

Sequest. de bon. eccl.

1875. B. No.

6. Writ of sequestrari facias de bonis ecclesiasticis.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D. and others, Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To the Right Reverend Father in God [John] by Divine permission Lord Bishop of greeting: Whereas we lately commanded our sheriff of that he should omit not by reason of any liberty of his county, but that he should enter the same, and cause [to be made, *if after the return to a fieri facias, or* delivered, *if after the return to an elegit, &c., and in either case recite the former writ*]. And whereupon our said sheriff of on [*or* "at a day past"] returned to us in the division of our said Court of Justice, that the said *C. D.* was a beneficed clerk; that is to say, rector of the rectory [*or* vicar of the vicarage] and parish church of , in the county of , and within your diocese, and that he had not any goods or chattels, or any lay fee in his bailiwick [*here follow the words of the sheriff's return*]. Therefore, we command you that you enter into the said rectory [*or* vicarage] and parish church of , and take and sequester the same into your possession, and that you hold the same in your possession until you shall have levied the said *l.* and interest aforesaid, of the rents, tithes, rent-charges in lieu of tithes, oblations, obventions, fruits, issues, and profits thereof, and other ecclesiastical goods in your diocese of and belonging to the said rectory [*or* vicarage] and parish church

of , and to the said *C. D.* as rector [*or* vicar] thereof to be rendered to the said *A. B.*, and what you shall do therein make appear to us in our said Court immediately after the execution hereof, and have you there then this writ. Witness ourself at Westminster, the day of , in the year of our Lord . Act 1875, Appx. F. Nos. 6—8.

As to this writ, see also O. XLIII., r. 2, *ante*, p. 371.
For form of præcipe, see *ante*, p. 550, No. 5.

No. 7.

Possession.

7. Writ of possession.

187 . B. No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D. and others, Defendants.

Victoria, to the sheriff of , greeting: Whereas lately in our High Court of Justice, by a judgment of the Division of the same Court [*A. B.* recovered] *or* [*E. F.* was ordered to deliver to *A. B.*] possession of all that with the appurtenances in your bailiwick: Therefore, we command you that you omit not by reason of any liberty of your county, but that you enter the same, and without delay you cause the said *A. B.* to have possession of the said land and premises with the appurtenances. And in what manner you have executed this our writ make appear to the Judges of the Division of our High Court of Justice immediately after the execution hereof, and have you there then this writ. Witness, &c.

As to this writ, see also O. XLVIII., *ante*, p. 383.
For form of præcipe, see *ante*, p. 551, No. 7.

No. 8.

Delivery.

8. Writ of delivery.

187 . B. No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D. and others, Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of greeting: We command you, that without delay you cause the following chattels, that is to say [*here enumerate the chattels recovered by the judgment for the return of which execution has been ordered to issue*], to be returned to *A. B.*, which the said *A. B.* lately in our recovered against *C. D.* [*or* *C. D.* was ordered to deliver to the said *A. B.*] in an action in

Act 1875, Appx. F. Nos. 8, 9.

the Division of our said Court*. And we further command you, that if the said chattels cannot be found in your bailiwick, you distrain the said *C. D.* by all his lands and chattels in your bailiwick, so that neither the said *C. D.* nor any one for him do lay hands on the same until the said *C. D.* render to the said *A. B.* the said chattels; and in what manner you shall have executed this our writ make appear to the Judges of the Division of our High Court of Justice, immediately after the execution hereof, and have you there then this writ. Witness, &c.

As to this writ, see also O. XLIX., *ante*, p. 384.
For form of præcipe, see *ante*, p. 551, No. 8.

The like, but instead of a distress until the chattel is returned, commanding the Sheriff to levy on defendant's goods the assessed value of it.

[*Proceed as in the preceding form until the* *, *and then thus:*] And we further command you, that if the said chattels cannot be found in your bailiwick, of the goods and chattels of the said *C. D.* in your bailiwick you cause to be made *l.* [*the assessed value of the chattels*], and in what manner you shall have executed this our writ make appear to the Judges of the Division of our High Court of Justice at Westminster, immediately after the execution hereof, and have you there then this writ. Witness, &c.

The asterisk (*) is omitted in the first portion of Form 8, in the Act of 1875, as issued by the Queen's printers, but it seems from Forms 34 and 35 to Reg. Gen. M. T. 1854, from which Form 8 in this Appendix is taken, that the place for the asterisk in the first portion of Form 8 is that above shown.

No. 9.

Attachment.

9. Writ of attachment.

187 . No.

In the High Court of Justice.
Division.
Between *A. B.*, Plaintiff,
and
C. D. and others, Defendants.

Victoria, &c.

To the sheriff of greeting.

We command you to attach *C. D.* so as to have him before us in the Division of our High Court of Justice wheresoever the said Court shall then be, there to answer to us, as well touching a contempt which he it is alleged hath committed against us, as also such other matters as shall be then and there laid to his charge, and further to perform and abide such order as our said Court shall make in this behalf, and hereof fail not, and bring this writ with you. Witness, &c.

As to this writ see also O. XLIV., *ante*, p. 371.
For form of præcipe, see *ante*, p. 551, No. 9.

No. 10.

Sequestration.

Act 1875, Appx. F. Nos. 10, 11.

187 . B. No.

10. Writ of sequestration.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D. and others, Defendants.

Victoria, &c.

To [*names of not less than four commissioners*] greeting.

Whereas lately in the Division of our High Court of Justice in a certain action there depending, wherein *A. B.* is plaintiff and *C. D.* and others are defendants [*or*, in a certain matter then depending, intituled "In the matter of *E. F.*, *as the case may be*] by a judgment [*or* order *as the case may be*] of our said Court made in the said action [*or* matter], and bearing date the day of 187 , it was ordered that the said *C. D.* should [pay into Court to the credit of the said action the sum of *l.*, *or as the case may be*]. Know ye, therefore, that we, in confidence of your prudence and fidelity, have given, and by these presents do give to you, or any three or two of you, full power and authority to enter upon all the messuages, lands, tenements, and real estate whatsoever of the said *C. D.*, and to collect, receive, and sequester into your hands not only all the rents and profits of his said messuages, lands, tenements, and real estate, but also all his goods, chattels, and personal estates whatsoever; and therefore we command you, any three or two of you, that you do at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements, and real estates of the said *C. D.*, and that you do collect, take and get into your hands not only the rents and profits of his said real estate, but also all his goods, chattels, and personal estate, and detain and keep the same under sequestration in your hands until the said *C. D.* shall [pay into Court to the credit of the said action the sum of *l.*, *or as the case may be*], clear his contempt, and our said Court make other order to the contrary. Witness, &c.

As to this writ, see O. XLVII., *ante*, p. 382.
For form of præcipe, see *ante*, p. 551, No. 6.

No. 11.

Delivery or Assessed Value.

11. Delivery or assessed value.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the sheriff of greeting.

We command you that without delay you cause to be returned to the following chattels, namely [*Enumerate chattels re-*

Act 1875, Appx. F. Nos. 11, 12

covered by judgment for the return of which execution has been ordered to issue] which the said lately ["*Recovered against*" *or* "*was ordered to deliver to the said*"] in an action in our High Court of Justice. And we further command you that if the said chattels cannot be found in your bailiwick, then of the goods and chattels of the said in your bailiwick you cause to be made *l.* [*The assessed value of the chattels*]. And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution hereof. And have there then this writ. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of in the year of our Lord One thousand eight hundred and . If the chattels cannot be found in your bailiwick, levy *l.*, the assessed value thereof, and interest thereon at 4*l.* per centum per annum, from the day of , 18 , until payment, besides sheriff's poundage, officers' fees, costs of levying, and all other legal incidental expenses.

This writ was issued by , of , agent for , of , solicitor to the , who reside at .

The defendant is a , and reside at , in your bailiwick.

No. 12.

Distringas.

12. Distringas against ex-sheriff.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the sheriff of greeting.

We command you that you distrain late sheriff of your county aforesaid by all his land and chattels in your bailiwick, so that neither he nor anyone by him do lay hands on the same until you shall have another command from us in that behalf, and that you answer to us for the issues of the same, so that the said expose for sale and sell or cause to be sold for the best price that can be gotten for the same, those goods and chattels which were of in your bailiwick, to the value of *l.* ["*the amount of*," *or* "*part of*"] the sum of *l.* which lately before us in our High Court of Justice in a certain action wherein plaintiff and defendant , by a ["*judgment*" *or* "*order*"] of our said Court bearing date the day of , was ["*adjudged*" *or* "*ordered*"] to be paid by the said to the said , and of the sum of *l.*, the amount at which the costs in the said mentioned have been taxed and allowed, and of interest on the said sum of *l.* at the rate of 4*l.* per centum per annum from the day of ,

and on the said sum of *l.* at the same rate from the day of , which goods and chattels he lately took by virtue of our writ, and which remain in his hands for want of buyers, as the said late sheriff hath lately returned to us in our said Court. And have the money arising from such sale before us in our said Court immediately after the execution hereof, to be paid to the said . And have there then this writ. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of , in the year of our Lord One thousand eight hundred and . Act 1875, Appx. F. Nos. 12, 13.

This writ was issued by , of , agent for , of , solicitor for the , who reside at .

The defendant is a , and resides at , in your bailiwick.

No. 13.

Fi. fa. Mayor's Court.

13. Fieri facias on judgment removed from Lord Mayor's court.

18 . No. .

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the sheriff of greeting.

Whereas by the judgment of the Mayor's Court, London, it has been adjudged that the said recover against the said the sum of [*debt and costs*]. And whereas this judgment has been removed into our High Court of Justice, and has become of the same effect as a judgment recovered in that Court. And whereas the costs attendant on the removal of the said judgment were on the [*day of removal*] day of , 18 , taxed and allowed at [*costs of removal*]. Therefore we command you, that of the goods and chattels of the said in your bailiwick, you cause to be made the said sums of *l.* and *l.* with interest thereon at the rate of 4*l.* per centum per annum from the said day of , 18 , and that you have that money and interest before us in our said Court immediately after the execution hereof, to be rendered to the said . And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution hereof. And have then there this writ. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of in the year of our Lord One thousand eight hundred and . Levy *l.*, and *l.* for costs of execution, and also interest on *l.* at 4*l.* per centum per annum, from the day of , 18 , until payment; besides sheriff's poundage, officers' fees, costs of levying, and all other legal incidental expenses.

Act 1875, Appx. F. No. 13.

This writ was issued by , of , agent for , of , solicitors for the said plaintiff.

The defendant is a , and resides at in your bailiwick.

See 20 & 21 Vict. c. 47, s. 48, and *Bridge* v. *Branch*, 1 C. P. D. 633.

Appendix G.

APPENDIX (G).

No. 1.

1. Subpœna ad testificandum (general form).

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To [*the names of three witnesses may be inserted*] greeting.

We command you to attend before at on the day of , 18 , at the hour of in the noon, and so from day to day until the above cause is tried, to give evidence on behalf of the ["Plaintiff" *or* "Defendant"]. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of , in the year of our Lord one thousand eight hundred and .

No. 2.

2. Subpœna duces tecum (general form).

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To [*the names of three witnesses may be inserted*] greeting.

We command you to attend before at on day the day of , 18 , at the hour of in the noon, and so from day to day until the above cause is tried, to give evidence on behalf of the , and also to bring with you and produce at the time and place aforesaid [*specify documents to be produced*]. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of , in the year of our Lord one thousand eight hundred and .

No. 3.

3. Subpœna ad testificandum at assizes.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To [*the names of three witnesses may be inserted*] greeting.

We command you to attend before our justices assigned to take the assizes in and for the county of to be holden at on day the day of , 18 , at the hour of in the noon, and so from day to day during the said assizes until the above cause is tried, to give evidence on behalf of the . Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of , in the year of our Lord one thousand eight hundred and .

No. 4.

4. Subpœna duces tecum at assizes.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To [*the names of three witnesses may be inserted*] greeting.

We command you to attend before our justices assigned to take the assizes in and for the county of to be holden at on day the day of , 18 , at the hour of in the noon, and so from day to day during the said assizes, until the above cause is tried, to give evidence on behalf of the , and also to bring with you and produce at the time and place aforesaid [*specify documents to be produced*]. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of , in the year of our Lord one thousand eight hundred and .

No. 5.

5. Subpœna ad testificandum at sittings of High Court.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To [*the names of three witnesses may be inserted*] greeting.

We command you to attend at the sittings of the

Act 1875, Appx. G. Nos. 5—7.

Division of our High Court of Justice, for [London *or* Westminster], to be holden at on day the day of , 18 , at the hour of in the noon, and so from day to day during the said sittings, until the above cause is tried, to give evidence on behalf of the . Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of , in the year of our Lord one thousand eight hundred and .

No. 6.

6. Subpœna duces tecum at sittings of High Court.

. 18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To [*the names of three witnesses may be inserted*].

We command you to attend at the sittings of the Division of our High Court of Justice for [London *or* Westminster], to be holden at to day the day of , 18 , at the hour of o'clock in the noon, and so from day to day until the above cause is tried, to give evidence on behalf of the , and also to bring with you and produce at the time and place aforesaid [*specify documents to be produced*]. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of in the year of our Lord one thousand eight hundred and .

No. 7.

7 Writ of inquiry for assessment of damage.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the sheriff of greeting.

Whereas it has been adjudged that the plaintiff recover against the defendant damages to be assessed ; therefore we command you, that by the oaths of twelve good and lawful men of your bailiwick you inquire what damages the plaintiff is entitled to recover under the said judgment, and that forthwith thereafter you send the inquisition which you shall take thereupon to our said Court, under your seal, and the seals of those by whose oaths you take the inquisition, together with this writ. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of , in the year of our Lord one thousand eight hundred and .

The writ was issued by of , agent for of , solicitor for the , who reside at .

The defendant is a and resides at in your bailiwick.

No. 8.

Act 1875, Appx. G. Nos. 8, 9.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

8. Certiorari to county court.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the judge of the County Court holden at , greeting.

We, willing for certain causes to be certified of a plaint levied in our Court before you against , at the suit of , command you that you send to us forthwith in the Division of our High Court of Justice the said plaint with all things touching the same, as fully and entirely as the same remain in our said Court before you, by whatsoever names the parties may be called therein, together with this writ, that we may further cause to be done thereupon what of right we shall see fit to be done. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of , in the year of our Lord one thousand eight hundred and .

This writ was issued by of , agent for , of , solicitor for the , who reside at .

No. 9.

18 . No.

9. Certiorari (general).

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the , greeting.

We, willing for certain causes to be certified of , command you that you send to us in our High Court of Justice on the day of the aforesaid, with all things touching the same, as fully and entirely as they remain in , together with this writ, that we may further cause to be done thereupon what of right we shall see fit to be done. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of , in the year of our Lord one thousand eight hundred and .

This writ was issued by , of , agent for , of , solicitor for the , who reside at .

Act 1875, Appx. G. Nos. 10, 11.

No. 10.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

10. Prohibition.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the judge of the County Court holden at] , to [*name of plaintiff*] of , greeting.

Whereas we have been given to understand that you the said have [entered a plaint against] *C. D.* in the said Court, and that the said Court has no jurisdiction in the said [cause] or to hear and determine the said [plaint] by reason that [*state facts showing want of jurisdiction*]. We therefore hereby prohibit you from further proceeding in the said [action] in the said Court. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of , in the year of our Lord one thousand eight hundred and .

This writ was issued by of , agent for , of , solicitor for the , who reside at .

No. 11.

18 . No.

11. Commission to examine witnesses.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To of , and of , Commissioners named by and on behalf of the , and to of , and of , Commissioners named by and on behalf of the , greeting:

Know ye that we in confidence of your prudence and fidelity have appointed you and by these presents give you power and authority to examine on interrogatories and *viva voce* as hereinafter mentioned witnesses on behalf of the said , and respectively, at , before you, or any two of you, so that one Commissioner only on each side be present and act at the examination.—And we command you as follows:

1. Both the said and the said shall be at liberty to examine on interrogatories and *viva voce* on the subject matter thereof or arising out of the answers thereto such witnesses as shall be produced on their behalf with liberty to the other party to cross-examine the said witnesses on cross-interrogatories and *viva voce* on the subject matters thereof or arising out of the answers thereto, the party producing any witness for examination being at liberty to re-examine him *viva voce*; and all such additional *viva voce* questions, whether on examination, cross-examination, or re-examination, shall be reduced into

writing, and with the answers thereto shall be returned with the said Commission. Act 1875, Appx. G. No. 11.

2. Not less than days before the examination of any witness on behalf of either of the said parties, notice in writing, signed by any one of you, the Commissioners of the party on whose behalf the witness is to be examined, and stating the time and place of the intended examination and the names of the witnesses to be examined, shall be given to the Commissioners of the other party by delivering the notice to them, or by leaving it at their usual place of abode or business, and if the Commissioners or Commissioner of that party neglect to attend pursuant to the notice, then one of you, the Commissioners of the party on whose behalf the notice is given, shall be at liberty to proceed with and take the examination of the witness or witnesses *ex parte*, and adjourn any meeting or meetings, or continue the same from day to day until all the witnesses intended to be examined by virtue of the notice have been examined, without giving any further or other notice of the subsequent meeting or meetings.

3. In the event of any witness on his examination, cross-examination, or re-examination producing any book, document, letter, paper, or writing, and refusing for good cause to be stated in his deposition to part with the original thereof, then a copy thereof, or extract therefrom, certified by the Commissioners or Commissioner present and acting to be a true and correct copy or extract, shall be annexed to the witnesses' deposition.

4. Each witness to be examined under this Commission shall be examined on oath, affirmation, or otherwise in accordance with his religion by or before the Commissioners or Commissioner present at the examination.

5. If any one or more of the witnesses do not understand the English language (the interrogatories, cross-interrogatories, and *viva voce* questions, if any, being previously translated into the language with which he or they is or are conversant), then the examination shall be taken in English through the medium of an interpreter or interpreters to be nominated by the Commissioners or Commissioner present at the examination, and to be previously sworn according to his or their several religions by or before the said Commissioners or Commissioner truly to interpret the questions to be put to the witness and his answers thereto.

6. The depositions to be taken under this Commission shall be subscribed by the witness or witnesses, and by the Commissioners or Commissioner who shall have taken the depositions.

7. The interrogatories, cross-interrogatories, and depositions, together with any documents referred to therein, or certified copies thereof or extracts therefrom, shall be sent to the Senior Master of the Supreme Court of Judicature on or before the day of , enclosed in a cover under the seals or seal of the Commissioners or Commissioner.

8. Before you or any of you, in any manner act in the execution hereof, you shall severally take the oath hereon indorsed on the Holy Evangelists or otherwise in such other manner as is sanctioned by the form of your several religions and is considered by you respectively to be binding on your respective consciences.

And we give you or any one of you authority to administer such oath to the other or others of you. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of , in the year of our Lord one thousand eight hundred and .

Act 1875, Appx. G. Nos. 11, 12.

This writ was issued by of , agent for of , solicitor for the , who reside at .

Witnesses' oath.

You are true answer to make to all such questions as shall be asked you, without favour or affection to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth. So help you God.

Commissioners' oath.

You shall, according to the best of your skill and knowledge, truly and faithfully, and without partiality to any or either of the parties in this cause, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the Commission within written. So help you God.

Interpreter's oath.

You shall truly and faithfully, and without partiality to any or either of the parties in this cause, and to the best of your ability, interpret and translate the oath or oaths, affirmation or affirmations which he shall administer to, and all and every the questions which shall be exhibited or put to, all and every witness and witnesses produced before and examined by the Commissioners named in the Commission within written, as far forth as you are directed and employed by the said Commissioners, to interpret and translate the same out of the English into the language of such witness or witnesses, and also in like manner to interpret and translate the respective depositions taken and made to such questions out of the language of such witness or witnesses into the English language. So help you God.

Clerk's oath.

You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take, write down, transcribe, and engross all and every the questions which shall be exhibited or put to all and every witness and witnesses, and also the depositions of all and every such witness and witnesses produced before and examined by the said Commissioners named in the Commission within written, as far forth as you are directed and employed by the Commissioners to take, write down, transcribe or engross the said questions and depositions. So help you God.

Direction of Interrogatories, &c., when returned by the Commissioners.

The Senior Master of the Supreme Court of Judicature, Royal Courts of Justice, London.

See O. XXXVII. r. 4, *ante*, p. 346, and 1 & 2 Will. 4, c. 22, s. 4.

No. 12.

12. Habeas corpus ad testificandum.

18 . No.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the [keeper of our prison at]

We command you that you bring , who it is said is detained in our prison under your custody , before

at on day the day of at the hour of in the noon, and so from day to day until the above action is tried, to give evidence on behalf of the . And that immediately after the said shall have so given his evidence you safely conduct him to the prison from which he shall have been brought. Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of in the year of Our Lord one thousand eight hundred and . Act 1875, Appx. G. No. 13.

This writ was issued by of , agent for of , solicitor for the , who reside at .

APPENDIX (H).

Appendix H.

SUMMONSES AND ORDERS.

No. 1.

18 . No. . 1. Summons (general form).

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Let all parties concerned attend the Judge [*or* Master] in Chambers on day the day of 18 , at o'clock in the noon, on the hearing of an application on the part of .

Dated the day of , 18 .

This summons was taken out by of , solicitor for .

To

See O. LIV. r. 8, *ante*, p. 404.

No. 2.

18 . No. . 2. Order (general form).

In the High Court of Justice.
Division.

[*Insert name of Judge or Master*] Judge [*or* Master] in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 ,

Act 1875, Appx. H. Nos. 2—5.

and : It is ordered and that the costs of this application be .

Dated the day of , 18 .

See O. LIV. r. 13, *ante*, p. 405.

No. 3.

3. Order for time.

18 . No. .

In the High Court of Justice.
Division.
Master in Chambers.
Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 . and : It is ordered that the shall have time, and that the costs of this application be .

Dated the day of , 18 .

No. 4.

4 Order under Order XIV., No. 1.

18 . No. .

In the High Court of Justice.
Division.
Master in Chambers.
Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 . and : It is ordered that the plaintiff may sign final judgment in this action for the amount indorsed on the writ, with interest, if any, and costs to be taxed, and that the costs of this application be .

Dated the day of , 18 .

No. 5.

5. Order under Order XIV., No. 2.

18 . No. .

In the High Court of Justice.
Division.
Master in Chambers.
Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing , and upon reading the affidavit of filed the day of , 18 , and : It is ordered that the defendant be at liberty to defend this action by delivering a statement of defence within days after delivery of the plaintiff's statement of claim, and that the costs of this application be .

Dated the day of , 18 .

No. 6.

18 . No. .

In the High Court of Justice.
Division.

Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

6. Order under Order XIV., No. 3.

Upon hearing and upon reading the affidavit of filed the day of , 18 , and : It is ordered that if the defendant pay into Court within a week from the date of this order the sum of £ , he be at liberty to defend this action by delivering a statement of defence within days after delivery of the plaintiff's statement of claim, but that if that sum be not so paid the plaintiff be at liberty to sign final judgment for the amount indorsed on the writ of summons, with interest, if any, and costs, and that in either event the costs of this application be .

Dated the day of , 18 .

No. 7.

18 . No. .

In the High Court of Justice.
Division.

7. Order under Order XIV., No. 4.

Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing and upon reading the affidavit of filed the day of , 18 , and : It is ordered that if the defendant pay into Court within a week from the date of this order the sum of £ , he be at liberty to defend this action as to the whole of the plaintiff's claim; and it is ordered that if that sum be not so paid the plaintiff be at liberty to sign judgment for that sum and the defendant be at liberty to defend this action as to the residue of the plaintiff's claim; and it is ordered that in either event the statement of defence be delivered within days after delivery of the plaintiff's statement of claim, and that the costs of this application be .

Dated the day of , 18 .

See O. XIV. r. 4, *ante*, p. 222.

No. 8.

18 . No. .

In the High Court of Justice.
Division.

8. Order to amend.

Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing and upon reading the affidavit of filed the day of , 18 , and

: It is ordered that the plaintiff be at liberty to amend the writ of summons in this action by , and that the costs of this application be .

Dated the day of , 18 .

No. 9.

9. Order for particulars (partnership).

18 . No. .

In the High Court of Justice.
Division.
Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing and upon reading the affidavit of , filed the day of , 18 , and : It is ordered that the furnish the with a statement in writing, verified by affidavit, setting forth the names of the persons constituting the members or co-partners of their firm, pursuant to the rules of the Supreme Court Order XVI., Rule 10, and that the costs of this application be .

Dated the day of , 18 .

No. 10.

10. Order for particulars (general).

18 . No. .

In the High Court of Justice.
Division.
Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing and upon reading the affidavit of filed the day of 18 , and : It is ordered that the plaintiff deliver to the defendant an account in writing of the particulars of the plaintiff's claim in this action, and that unless such particulars be delivered within days from the date of this order all further proceedings be stayed until the delivery thereof, and that the costs of this application be .

Dated the day of , 18 .

See note to O. XIX. r. 8, *ante*, p. 254.

No. 11.

11. Order for particulars (accident case).

18 . No. .

In the High Court of Justice.
Division.
Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing and upon reading the affidavit of filed the day of , 18 , and : It is

ordered that the plaintiff deliver to the defendant an account in writing of the particulars of the injuries and expenses mentioned in the statement of claim, together with the time and place of the accident, number of the , and the particular acts of negligence complained of, and that unless such particulars be delivered within days from the date of this order all further proceedings in this action be stayed until the delivery thereof, and that the costs of this application be .

Dated the day of , 18 .

Act 1875, Appx. H. Nos. 11—14.

No. 12.

18 . No. .

12. Order to discharge or vary on application by third party.

In the High Court of Justice.
Division.
Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing and upon reading the affidavit of filed the day of , 18 , and : It is ordered that the order of in this action dated the day of , 18 , be discharged [*or* varied by], and that the costs of this application be .

Dated the day of , 18 .

No. 13.

18 . No. .

13. Order to dismiss for want of prosecution.

In the High Court of Justice.
Division.
Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing and upon reading the affidavit of , filed the day of , 18 , and : It is ordered that this action be, for want of prosecution, dismissed with costs to be taxed and paid to the defendant by the plaintiff, and that the costs of this application be .

Dated the day of , 18 .

See O. XXIX. r. 1, and O. XXXVI. r. 4, or *ante*, pp. 282, 320.

No. 14.

18 . No. .

14. Order for delivery of interrogatories.

In the High Court of Justice.
Division.
Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing and upon reading the affidavit of , filed the day of , 18 ,

Act 1875, Appx. H. Nos. 14—16.

and : It is ordered that the be at liberty to deliver to the interrogatories in writing, and that the said do, within days from the date of this order, answer the interrogatories in writing by affidavit, and that the costs of this application be

Dated the day of , 18 .

See O. XXXI. r. 1, *ante*, p. 290.

No. 15.

15. Order for affidavit as to documents.

18 . No. .

In the High Court of Justice.
Division.
Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing : It is ordered that the do, within days from the date of this order, answer on affidavit stating what documents are or have been in possession or power relating to the matters in question in this action, and that the costs of this application be .

Dated the day of , 18 .

See O. XXXI. r. 12, *ante*, p. 299.

No. 16.

16. Order to produce documents for inspection.

18 . No. .

In the High Court of Justice.
Division.
Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing and upon reading the affidavit of , filed the day of 18 . and : It is ordered that the do, at all seasonable times, on reasonable notice, produce at the office of solicitor, situate at , the following documents, namely , and that the be at liberty to inspect and peruse the documents so produced, and to take copies and abstracts thereof and extracts therefrom, at expense, and that in the meantime all further proceedings be stayed, and that the costs of this application be .

Dated the day of , 18 .

No. 17.

17. Order for production (underwriters).

18 . No. .

In the High Court of Justice.
Division.
Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and : It is ordered that the (*a*) do produce and show to the upon oath all insurance slips, policies, letters of instruction, or other orders for effecting such slips or policies, or relating to the insurance or the subject matter of the insurance on the ship , or the cargo on board thereof, or the freight thereby, and also all documents relating to the sailing or alleged loss of the said ship , the cargo on board thereof and the freight thereby, and all letters and correspondence with any person or persons in any manner relating to the effecting the insurance on the said ship, the cargo on board thereof, or the freight thereby, or any other insurance whatsoever effected on the said ship, or the cargo on board thereof, or the freight thereby on the voyage insured by, or relating to the policy sued upon in this action, or any other policy whatsoever effected on the said ship, or the cargo on board thereof, or the freight thereby on the same voyage. Also all correspondence between the captain or agent of the vessel and any other person, with the owner or any person or persons previous to the commencement of or during the voyage upon which the alleged loss happened. Also all protests, surveys, log-books, charter-parties, tradesmen's bills for repairs, average statements, letters, invoices, bills of parcels, bills of lading, manifests, accounts, accounts-current, accounts-sales, bills of exchange, receipts, vouchers, books, documents, correspondence papers, and writings, (whether originals, duplicates, or copies respectively,) which now are in the custody, possession, or power, of the , his brokers, solicitors, or agents, in any way relating or referring to the matters in question in this action, with liberty for the to inspect and take copies of or extracts from the same or any of them, and that in the meantime all further proceedings be stayed, and that the costs of this application be .

Dated the day of , 18 .

(*a*) The blank may be filled up by inserting, "The plaintiffs and *all persons interested* in these proceedings and in the insurance, the subject of this action." *China Steamship Co.* v. *Commercial Ins. Co.*, W. N. 1881, p. 165, C. A.

No. 18.

18. Order for service out of jurisdiction.

18 . No. .

In the High Court of Justice.
Division.
Judge in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 ,

and : It is ordered that the plaintiff be at liberty to issue a writ for service out of the jurisdiction against . And it is further ordered that the time for appearance to the said writ be within days after the service thereof, and that the costs of this application be .

Dated the day of , 18 .

See O. XI. and O. LIV. r. 2.

No. 19.

19. Order for substituted service.

18 . No. .

In the High Court of Justice.
Division.
Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and : It is ordered that service of a copy of this order, and of a copy of the writ of summons in this action, by sending the same by a pre-paid post letter, addressed to the defendant , at , shall be good and sufficient service of the writ.

Dated the day of 18 .

See O. IX. *ante*, p. 210.

No. 20.

20. Order for renewal of writ.

18 . No. .

In the High Court of Justice.
Division.
Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and : It is ordered that the writ in this action be renewed for six months from the date of its renewal, pursuant to the Rules of the Supreme Court Order VIII., Rule 1.

Dated the day of , 18 .

No. 21.

21. Order for issue of notice claiming contribution.

18 . No.

In the High Court of Justice.
Division.
Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 ,

and : It is ordered that the defendant be at liberty to issue a notice claiming over against , pursuant to the Rules of the Supreme Court Order XVI., Rule 18. Act 1875, Appx. H. Nos. 21, 22.

Dated the day of , 18 .

No. 22.

22. Order of reference.

In the High Court of Justice.
Division.
Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing , and by consent it is ordered as follows:

1. [*State matters to be referred*] shall be referred to the award of .

2. The arbitrator shall have all the powers as to certifying and amending of a judge of the High Court of Justice.

3. The arbitrator shall make and publish his award in writing of and concerning the matters referred, ready to be delivered to the parties in difference, or such of them as require the same (or their respective personal representatives, if either of the said parties die before the making of the award) on or before the next, or on or before such further day as the arbitrator may from time to time appoint and signify in writing signed by him and indorsed on this order.

4. The said parties shall in all things abide by and obey the award so to be made.

5. The costs of the said cause and the costs of the reference and award shall be .

6. The arbitrator may (if he think fit) examine the said parties to this action, and their respective witnesses, upon oath or affirmation.

7. The said parties shall produce before the arbitrator all books, deeds, papers, and writings in their or either of their custody or power relating to the matters in difference.

8. Neither the plaintiff nor the defendant shall bring or prosecute any action against the arbitrator of or concerning the matte so to be referred.

9. If either party by affected delay or otherwise wilfully prevent the said arbitrator from making an award, he or they shall pay such costs to the other as may think reasonable and just.

10. In the event of either of the said parties disputing the validity of the said award, or moving the to set it aside, the said shall have power to remit the matters hereby referred or any or either of them to the reconsideration of the arbitrator.

Act 1875, Appx. H. Nos. 22—24.

11. In the event of the arbitrator declining to act or dying before he has made his award, the said parties may, or if they cannot agree, one of the Masters of the Supreme Court of Judicature may, on application by either side, appoint a new arbitrator.

12. Unless restrained by any order of the High Court of Justice, or of any judge thereof, the party or parties in whose favour the award shall be made shall be at liberty within days after service of a copy of the award on the solicitor or agent of the other party to sign final judgment in accordance with the award, and for all costs that he or they may be entitled to under this order, and under the award, together with the costs of the said judgment.

Dated the day of , 18 .

See O. XLI. rr. 3, 4, *ante*, p. 361.

No. 23.

23. Order for examination of witnesses before arbitrator.

18 . No. .

In the High Court of Justice.
Division.
Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing and upon reading the affidavit of , filed the day of , 18 , and : It is ordered that attend before , the arbitrator herein on the day of , 18 , at , and then and there submit to be examined on oath or affirmation on behalf of the touching the matters referred to the said arbitrator.

Dated day of , 18 .

See 3 & 4 Will. 4, c. 42, s. 40.

No. 24.

24. Order for examination of witnesses and production of documents.

18 . No. .

In the High Court of Justice.
Division.
Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing and upon reading the affidavit of , filed day of , 18 , and : It is ordered that attend before the arbitrator herein on the day of , on , 18 , at , and then and there submit to be examined on oath or affirmation on behalf of the touching the matters referred to the said arbitrator; and it is further ordered that the said do at the time and

place aforesaid produce and deliver to the said arbitrator the papers, documents, and writings hereinafter mentioned, that is to say [*specify documents to be produced*]. Act 1875, Appx. H. Nos. 24—26.

Dated the day of , 18 .

See 3 & 4 Will. 4, c. 42, s. 40.

No. 25.

18 . No. . 25. Order charging stock—nisi.

In the High Court of Justice.
Division.

Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing , and upon reading the affidavit of filed the day of , 18 , whereby it appears : It is ordered that unless sufficient cause be shown to the contrary before on day the day of , 18 , at o'clock in the forenoon, the defendant's interest in the so standing as aforesaid shall, and that it in the meantime do, stand charged with the payment of the above-mentioned amount due on the said judgment.

Dated the day of , 18 .

See O. XLVI. r. 1, *ante*, p. 377.

No. 26.

18 . No. . 26. Order charging stock—absolute.

In the High Court of Justice.
Division.

Judge in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing , and upon reading the affidavit of filed the day of , 18 , and an order nisi made herein on the day of , 18 , reciting the affidavit of , whereby it appeared : It is ordered that the defendant's interest in the so standing as aforesaid stand charged with the payment of the above-mentioned amount due on the said judgment.

Dated the day of , 18 .

Act 1875, Appx. H. Nos. 27—29.

No. 27.

18 . No. .

In the High Court of Justice.
Division.

Judge in Chambers.

27. Charging order—solicitor's costs.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing , and upon reading the affidavit of filed the day of , 18 , and : It is ordered that the said the solicitor for the in this action shall have a charge upon for his costs, charges, and expenses of and in reference to this action.

Dated the day of , 18 .

See 23 & 24 Vict. c. 187, s. 28.

No. 28.

28. Order to remove judgment from county court.

18 . No. .

In the High Court of Justice.
Division.

Master in Chambers.

In the matter of a plaint in the County Court of holden at . wherein *A. B.*, Plaintiff, and *C. D.*, Defendant.

Upon reading the affidavit of filed the day of , 18 , and and the certified copy of the judgment in the plaint above-mentioned: It is ordered that a writ of certiorari issue to remove the said judgment from the above-named County Court into the Division of the High Court of Justice.

Dated the day of , 18 .

No. 29.

29. Order for arrest (capias) under Debtors' Act.

18 . No. .

In the High Court of Justice.
Division.

Judge in Chamber

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing , and upon reading the affidavit of filed the day of , 18 , and : It is ordered that the defendant be arrested and imprisoned for the term of from the date of his arrest, including the day of such date, unless and until he shall sooner deposit in Court the sum of £ , or give to the plaintiff a bond executed by him and two sufficient sureties in the penalty of £ , or some other security satisfactory to the

plaintiff, that ; and it is further ordered that the sheriff of do within one calendar month from the date hereof, including the day of such date, and not afterwards, take the defendant for the purpose aforesaid, if he shall be found in the said sheriff's bailiwick.

Dated the day of , 18 .

See Debtors Acts, 1869, 32 & 33 Vict. c. 62, s. 6.

No. 30.

18 . No. .

30. Commission to examine witnesses.

In the High Court of Justice.
Division.
Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing and upon reading the affidavit of , filed the day of 18 , and : It is ordered as follows:—

1. A commission may issue directed to of and commissioners named by and on behalf of the and to of and of commissioners named by and on behalf of the for the examination upon interrogatories and *viva voce* of witnesses on behalf of the said and respectively at aforesaid before the said commissioners, or any two of them, so that one commissioner only on each side be present and act at the examination.

2. Both the said and shall be at liberty to examine upon interrogatories and *viva voce* upon the subject matter thereof or arising out of the answers thereto such witnesses as may be produced on their behalf, with liberty to the other party to cross-examine the said witnesses upon cross interrogatories and *viva voce* on the subject matters thereof or arising out of the answers thereto, the party producing the witness for examination being at liberty to re-examine him *viva voce*; and all such additional *viva voce* questions, whether on examination, cross-examination, or re-examination, shall be reduced into writing, and, with the answers thereto, returned with the said commission.

3. Within days from the date of this order, the solicitors or agents of the said and shall exchange the interrogatories they propose to administer to their respective witnesses, and shall also within days from the exchange of such interrogatories, exchange copies of the cross-interrogatories intended to be administered to the said witnesses.

4. days previously to the sending out of the said commission, the solicitor of the said shall give to the solicitor of the said notice in writing of the mail or other conveyance by which the commission is to be sent out.

5. days previously to the examination of any witness on behalf of the said or respectively, notice

Act 1875, Appx. H. Nos. 30.

in writing signed by any one of the commissioners of the party on whose behalf the witness is to be examined and stating the time and place of the intended examination, and the names of the witnesses intended to be examined, shall be given to the commissioners of the other party by delivering the notice to them personally, or by leaving it at their usual place of abode or business, and if the commissioners of that party neglect to attend pursuant to the notice, then one of the commissioners of the party on whose behalf the notice is given shall be at liberty to proceed with and take the examination of the witness or witnesses *ex parte*, and adjourn any meeting or meetings, or continue the same, from day to day until all the witnesses intended to be examined by virtue of the notice have been examined, without giving any further or other notice of the subsequent meeting or meetings.

6. In the event of any witness on his examination, cross-examination, or re-examination producing any book, document, letter, paper, or writing, and refusing for good cause to be stated in his deposition, to part with the original thereof, then a copy thereof, or extract therefrom, certified by the commissioners or commissioner present to be a true and correct copy or extract, shall be annexed to the witnesses' deposition.

7. Each witness to be examined under the commission shall be examined on oath, affirmation, or otherwise in accordance with his religion by or before the said commissioners or commissioner.

8. If any one or more of the witnesses do not understand the English language (the interrogatories, cross-interrogatories, and *viva voce* questions, if any, being previously translated into the language with which he or they is or are conversant), then the examination shall be taken in English through the medium of an interpreter or interpreters, to be nominated by the commissioners or commissioner, and to be previously sworn according to his or their several religions by or before the said commissioners or commissioner truly to interpret the questions to be put to the witness or witnesses, and his and their answers thereto.

9. The depositions to be taken under and by virtue of the said commission shall be subscribed by the witness or witnesses, and by the commissioners or commissioner who shall have taken such depositions.

10. The interrogatories, cross-interrogatories, and depositions, together with any documents referred to therein, or certified copies thereof or extracts therefrom, shall be sent to the Senior Master of the Supreme Court of Judicature on or before the day of , or such further or other day as may be ordered, enclosed in a cover under the seal or seals of the said commissioners or commissioner, and office copies thereof may be given in evidence on the trial of this action by and on behalf of the said and respectively, saving all just exceptions, without any other proof of the absence from this country of the witness or witnesses therein named, than an affidavit of the solicitor or agent of the said or respectively, as to his belief of the .

11. The trial of this cause is to be stayed until the return of the said commission.

12. The costs of this order, and of the commission to be issued in pursuance hereof, and of the interrogatories, cross-interrogatories, and depositions to be taken thereunder, together with any such document, copy, or extract as aforesaid, and official copies thereof, and all other costs incidental thereto, shall be .

Act 1875, Appx. H. Nos. 30—32.

Dated the day of , 18 .

No. 31.

18 . No. .

31. Order of reference under s. 56 of the Judicature Act, 1873.

In the High Court of Justice.
Division.
Master in Chambers.

Between *A. B*, Plaintiff,
and
C. D., Defendant.

Upon hearing and upon reading the affidavit of filed the day of 18 , and : It is ordered that the following question arising in this action, namely, , be referred for inquiry and report to under section 56 of the Judicature Act, 1873, and that the costs of this application be .

Dated the day of , 18 .

No. 32.

18 . No. .

32. Order of reference under s. 57 of the Judicature Act, 1873.

In the High Court of Justice.
Division.
Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing and upon reading the affidavit of filed the day of 18 , and : It is ordered that the [*state whether all or some, and if so which, of the questions are to be tried*] in this action be tried by , who shall have all the powers as to certifying and amending of a Judge of the High Court of Justice, and shall make his report of and concerning the matters ordered to be tried as aforesaid pursuant to the statute. And it is further ordered that the said referee may, if he think fit, examine the parties to this action, and their respective witnesses, upon oath or affirmation, and that the said parties shall produce before the said referee all books, deeds, papers, and writings in their or either of their custody or power relating to the matters so ordered to be tried. And it is further ordered that neither the plaintiff nor the defendant shall bring or prosecute any action against the said referee, or against each other, of or concerning the matters so ordered to be tried, and that if either party by affected delay or otherwise wilfully prevent the said referee from making his report, he or they shall pay such costs to the other as the High Court, or any Judge thereof, may think reasonable and just. And it is further ordered, that in the event of the said referee declining to act, or

Act 1875, Appx. H. Nos. 32—34.

dying before he has made his report, the said parties may, or if they cannot agree, one of the Judges of the High Court may, upon application by either party, appoint a new referee. And it is ordered that the costs of this application be .

Dated the day of , 18 .

No. 33.

33. Order of reference to master.

18 . No. .

In the High Court of Justice.
Division.
Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and : It is ordered that this action [*or* the matters of account in this action, *or* the following questions in this action being matters of account, namely, *stating them*] be referred to the certificate of one of the Masters of the Supreme Court of Judicature, with all the powers as to certifying and amending of a Judge of the High Court of Justice, and that the costs of the and of the reference be in the discretion of the Master, and that the costs of this application be .

Dated the day of , 18 .

See s. 3 of the C. L. P. Act, 1854.

No. 34.

34. Order for examination of witnesses before trial.

18 . No. .

In the High Court of Justice.
Division.
Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and : It is ordered that , a witness on behalf of the , be examined *vivâ voce* (on oath or affirmation) before one of the Masters of the Supreme Court of Judicature [*or* before , esquire, special examiner], the solicitor or agent giving to the solicitor or agent notice in writing of the time and place where the examination is to take place. And it is further ordered that the examination so taken be filed in the Central Office of the Supreme Court of Judicature, and that an office copy or copies thereof may be read and given in evidence on the trial of this cause, saving all just exceptions, without any further proof of the absence of the said witness than the affidavit of the solicitor or agent of the as to his belief, and that the costs of this application be .

Dated the day of 18 .

No. 35.

18 . No. .

In the High Court of Justice.
Division.

Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

35. Order for issue of commission to examine witnesses.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and : It is ordered that the be at liberty to issue a commission for the examination of witnesses on behalf at . And it is further ordered that the trial of this action be stayed until the return of the said commission, the usual long order to be drawn up, and unless agreed upon by the parties within one week, to be settled by a Master, and that the costs of this application be .

Dated the day of 18 .

No. 36.

18 . No. .

In the High Court of Justice.
Division.

Master in Chambers.

Between *A. B.*, Judgment Creditor,
and
C. D., Judgment Debtor.

36. Order for examination of judgment debtor.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and : It is ordered that the above-named judgment debtor attend and be orally examined as to whether any and what debts are owing to him, before the Master in Chambers, at such time and place as he may appoint, and that the said judgment debtor produce his [books, *or* as may be ordered] before the said Master at the time of the examination, and that the costs of this application be .

Dated the day of , 18 .

No. 37.

18 . No. .

In the High Court of Justice.
Division.

Master in Chambers.

Between *A. B.*, Judgment Creditor,
and
C. D., Judgment Debtor,
E. F., Garnishee.

37. Garnishee order (attaching debt).

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and : It is ordered that all debts owing or accruing

Act 1875, Appx. H. Nos. 37—39.

due from the above-named garnishee to the above-named judgment debtor be attached to answer a judgment recovered against the said judgment debtor by the above-named judgment creditor in the High Court of Justice on the day of , 18 , for the sum of *l.*, on which judgment the said sum of *l.* remains due and unpaid. And it is further ordered that the said garnishee attend the Master in Chambers on day the day of , 18 , at o'clock in the noon, on an application by the said judgment creditor, that the said garnishee pay the debt due from him to the said judgment debtor, or so much thereof as may be sufficient to satisfy the judgment. And that the costs of this application be .

Dated the day of , 18 .

No. 38.

38. Garnishee order (absolute).

18 . No. .

In the High Court of Justice.
Division.
Master in Chambers.

Between *A. B.*, Judgment Creditor,
and
C. D., Judgment Debtor.
E. F., Garnishee.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and , whereby it was ordered that all debts owing or accruing due from the above-named garnishee to the above-named judgment debtor should be attached to answer a judgment recovered against the said judgment debtor by the above-named judgment creditor in the High Court of Justice on the day of , 18 , for the sum of *l.*, on which judgment the said sum of *l.* remained due and unpaid. It is ordered that the said garnishee do forthwith pay the said judgment creditor the debt due from him to the said judgment debtor (or so much thereof as may be sufficient to satisfy the judgment debt), and that in default thereof execution may issue for the same, and that the costs of this application be .

Dated the day of , 18 .

No. 39.

39. Order on client's application to tax solicitor's bill of costs.

18 . No. .

In the High Court of Justice.
Division.
Master in Chambers.

In the matter of , gentleman, one of the solicitors of the Supreme Court.

Upon the application of , [hereinafter called "the applicant"] : It is ordered that the bill of fees, charges, and disbursements delivered to the applicant by the above-named solicitor be referred to the Master to be taxed, and that the said solicitor give credit for all sums of money by him received of or

on account of the applicant, and that he refund what, if anything, he may on such taxation appear to have been overpaid. And it is further ordered that if the said solicitor attends on the taxation, the Master tax the costs of the reference, and certify what shall be found due to or from either party in respect of the bill and demand and of the costs of the reference, to be charged (if payable) according to the event of the taxation, pursuant to the statute. And it is further ordered that the said solicitor do not commence or prosecute any action or suit touching the demand pending the reference. And it is further ordered that upon payment by the applicant of what (if anything) may appear to be due to the said solicitor the said solicitor do (if required) deliver up to the applicant, or as he may direct, all deeds, books, papers, and writings in the said solicitor's possession, custody, or power, belonging to the applicant. And it is ordered that the costs of this application be .

Act 1875, Appx. H. Nos. 39, 40.

Dated the day of 18 .

No. 40.

18 . No. .

40. Order on solicitor's application to tax bill of costs.

In the High Court of Justice.
Division.

Master in Chambers.

In the matter of , gentleman, one of the solicitors of the Supreme Court.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and : It is ordered that the above-named solicitor's bill of fees, charges, and disbursements, delivered to (hereinafter called the said client) be referred to the Master to be taxed, and that the said solicitor give credit for all sums of money by him received from or on account of the said client, and that he refund what, if anything, he may on such taxation appear to have been overpaid. And it is further ordered that the Master tax the costs of the reference and certify what shall be found due to or from either party in respect of the bill and demand and of the costs of the reference, to be paid according to the event of the taxation pursuant to the statute. And it is further ordered that the said solicitor do not commence or prosecute any action or suit touching the demand pending the reference. And it is further ordered that upon payment by the said client of what (if anything) may appear to be due to the said solicitor, the said solicitor do (if required) deliver to the said client or as he may direct, all deeds, books, papers, and writings in the said solicitor's possession, custody, or power, belonging to the said client. And it is ordered that the costs of this application be .

Dated the day of , 18 .

Act 1875, Appx. H. Nos. 41—43.

No. 41.

18 . No. .

In the High Court of Justice.
Division.

Master in Chambers.

41. Order to tax after action brought.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and : It is ordered that the plaintiff's bill of costs, charges, and disbursements delivered to the defendant, for the recovery of which this action is brought, be referred to the Master to be taxed, and that the plaintiff give credit at the time of taxation for all sums of money by him received from or on account of the defendant. And it is further ordered that the Master tax the costs of the reference, and certify what upon such reference shall be found due to or from either party in respect of the bill and demand, and of the costs of the reference, pursuant to the statute. And it is further ordered that the plaintiff do not prosecute this action touching the demand pending the reference. And it is further ordered that upon payment of what (if anything) may appear to be due to the plaintiff, together with the costs of this action (which are to be also taxed and paid), all further proceedings therein be stayed, and that the costs of this application be .

Dated the day of , 18 .

No. 42.

18 . No. .

42. Order to try action in county court.

In the High Court of Justice.
Division.

Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and : It is ordered that this action be tried before the County Court of , holden at , and that the costs of this application be .

Dated the day of , 18 .

No. 43.

18 . No. .

43. Order to give security or try action in county court.

In the High Court of Justice.
Division.

Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 ,

and : It is ordered that unless the plaintiff within give full security for the defendant's costs to the satisfaction of one of the Masters of the Supreme Court of Judicature, this cause be remitted for trial before the County Court of , holden at , and that the costs of this application be .

Act 1875, Appx. H. Nos. 43—45.

Dated the day of , 18 .

No. 44.

18 . No. .

In the High Court of Justice.
Division.

Judge in Chambers.

Between *A. B.*, Judgment Creditor,
and
C. D., Judgment Debtor.

44. Order for examination touching means.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and : It is ordered that the above-named attend before the Judge in Chambers on the day of next, at in the noon, to be examined upon oath touching his means of paying the judgment debt, and that the costs of this application be .

Dated the day of , 18 .

No. 45.

18 . No. .

In the High Court of Justice.
Division.

Judge in Chambers.

Between *A. B.*, Judgment Creditor,
and
C. D., Judgment Debtor.

45. Order for payment of judgment debt by instalments.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and : It is ordered that the above-named judgment debtor do pay to the above-named judgment creditor the sum of *l.*, together with interest thereon at the rate of 4*l.* per centum per annum from the day of , 18 , the date of the judgment, and also *l.*, the costs of this application, in manner following; namely [*here describe the mode in which the payment is to be made*].

Dated the day of , 18 .

Act 1875, Appx. H. Nos. 46, 47.

No. 46.

18 . No. .

In the High Court of Justice.
Division.

Judge in Chambers.

46. Order for committal of judgment debtor.

Between *A. B.*, Judgment Creditor,
and
C. D., Judgment Debtor.

Upon hearing , and upon reading the affidavit of filed the day of , 18 , and : It is ordered that the above-named judgment debtor be, for default in payment of the debt hereinafter mentioned, committed to prison for the term of from the date of his arrest, including the day of such date, or until he shall pay *l.*, being the amount due from him in pursuance of a judgment [*or* order] of the High Court of Justice, bearing date the day of , 18 , together with interest thereon at 4*l.* per cent. per annum from the aforesaid date, and 1*l.* 6*s.* 8*d.* for costs of this order, and sheriff's fees for the execution thereof; and it is further ordered that the sheriff take the said debtor for the purpose aforesaid if he is found within his bailiwick; and it is ordered that the costs of this application be .

Dated the day of , 18 .

No. 47.

18 . No. .

In the High Court of Justice.
Division.

Judge in Chambers.

47. Order for committal of judgment debtor on non-payment of instalment.

Between *A. B.*, Judgment Creditor,
and
C. D., Judgment Debtor.

Upon hearing , and upon reading the affidavit of filed the day of , 18 , and : It is ordered that the above-named judgment debtor be for default in payment of *l.*, being the amount of the [*first*] instalment of the judgment debt of *l.* in this action directed to be paid pursuant to the order of bearing date the day of , 18 , committed to prison for the term of from the date of his arrest, including the day of such date, or until he shall pay the said instalment together with 13*s.* 4*d.* the costs of this order, and sheriff's fees for the execution thereof; and it is further ordered that the sheriff of take the said debtor for the purpose aforesaid if he is found in his bailiwick: And it is ordered that the costs of this application be

Dated the day of , 18 .

No. 48.

18 . No. .

In the High Court of Justice.
Division.

Master in Chambers.

48. Interpleader order, No. 1.

Between *A. B.*, Plaintiff,
and
C. D., Defendant,
and between
E. F., Plaintiff,
and
G. H., Respondent.

Upon hearing , and upon reading the affidavit of filed the day of , 18 , and : It is ordered that the claimant be barred, that no action be brought against the above-named [sheriff] , and that the costs of this application be .

Dated the day of , 18 .

No. 49.

18 . No. .

49. Interpleader order, No. 2.

In the High Court of Justice.
Division.

Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant,
and
E. F., Claimant.

Upon hearing , and upon reading the affidavit of filed the day of , 18 , and : It is ordered that the above-named claimant be substituted as defendant in this action in lieu of the present defendant, and that the costs of this application be .

Dated the day of , 18 .

No. 50.

18 . No. .

50. Interpleader order, No. 3.

In the High Court of Justice.
Division.

Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant,
and between
E. F., Claimant,
and the said , execution creditor, and the sheriff of , Respondents.

Upon hearing , and upon reading the affidavit of filed the day of , 18 , and : It is ordered that the said sheriff proceed to sell

Act 1875, Appx. H. Nos. 50, 51.

the goods seized by him under the writ of fieri facias issued herein, and pay the net proceeds of the sale, after deducting the expenses thereof, into Court in this cause, to abide further order herein: And it is further ordered that the parties proceed to the trial of an issue in the High Court of Justice, in which the said claimant shall be the plaintiff and the said execution creditor shall be the defendant, and that the question to be tried shall be whether at the time of the seizure by the sheriff the goods seized were the property of the claimant as against the execution creditor: And it is further ordered that this issue be prepared and delivered by the plaintiff therein within from this date, and be returned by the defendant therein within days, and be tried at : And it is further ordered that the question of costs and all further questions be reserved until after the trial of the said issue, and that no action shall be brought against the said sheriff for the seizure of the said goods.

Dated the day of , 18 .

No. 51.

51. Interpleader order, No. 4.

18 . No. .

In the High Court of Justice.
Division.

Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant,
and between
E. F., Claimant,
and the said , execution creditor, and
the sheriff of , Respondents.

Upon hearing , and upon reading the affidavit of filed the day of , 18 , and : It is ordered that upon payment of the sum of *l.* into Court by the said claimant within from this date, or upon his giving within the same time security to the satisfaction of one of the Masters of the Supreme Court for the payment of the same amount by the said claimant according to the directions of any order to be made herein, and upon payment to the above-named sheriff of the possession money from this date, the said sheriff do withdraw from the possession of the goods seized by him under the writ of fieri facias herein: And it is further ordered that unless such payment be made or security given within the time aforesaid the said sheriff proceed to sell the said goods, and pay the proceeds of the sale, after deducting the expenses thereof and the possession money from this date, into Court in the cause, to abide further order herein: And it is further ordered that the parties proceed to the trial of an issue in the High Court of Justice, in which the claimant shall be plaintiff and the execution creditor shall be defendant, and that the question to be tried shall be whether at the time of the seizure by the sheriff the goods seized were the property of the claimant as against the execution creditor: And it is further ordered that this issue be prepared and delivered by the plaintiff therein within from this date, and be

returned by the defendant therein within days, and be tried at : And it is further ordered that the question of costs and all further questions be reserved until after the trial of the said issue, and that no action shall be brought against the sheriff for the seizure of the said goods. Act 1875. Appx. H. Nos. 51, 52.

Dated the day of , 18 .

No. 52.

18 . No. 52. Interpleader order, No. 5.

In the High Court of Justice.
Division.

Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant,
and between
Claimant
and the said , execution creditor, and
the sheriff of Respondents.

Upon hearing and upon reading the affidavit of filed the day of , 18 , and : It is ordered that upon payment of the sum of *l.* into Court by the said claimant, or upon his giving security to the satisfaction of one of the Masters of the Supreme Court for the payment of the same amount by the claimant according to the directions of any order to be made herein, the above-named sheriff withdraw from the possession of the goods seized by him under the writ of fieri facias issued herein: And it is further ordered that in the meantime, and until such payment made or security given, the sheriff continue in possession of the goods, and the claimant pay possession money for the time he so continues, unless the claimant desire the goods to be sold by the sheriff, in which case the sheriff is to sell them and pay the proceeds of the sale, after deducting the expenses thereof and the possession money from this date, into Court in the cause, to abide further order herein: And it is further ordered that the parties proceed to the trial of an issue in the High Court of Justice, in which the claimant shall be plaintiff and the execution creditor shall be defendant, and that the question to be tried shall be whether at the time of the seizure by the sheriff the goods seized were the property of the claimant as against the execution creditor: And it is further ordered that this issue be prepared and delivered by the plaintiff therein within from this date, and be returned by the defendant therein within days, and be tried at : And it is further ordered that the question of costs and all further questions be reserved until after the trial of the said issue, and that no action shall be brought against the sheriff for the seizure of the said goods.

Dated the day of , 18 .

Act 1875. Appx. H. Nos. 53, 54.

No. 53.

18 . No.

In the High Court of Justice.
Division.

53. Interpleader order, No. 6.

Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant,
and between
E. F., Claimant,
and the said , execution creditor and
the sheriff of Respondents.

The claimant and the execution creditor having requested and consented that the merits of the claim made by the claimant be disposed of and determined in a summary manner, now upon hearing and upon reading the affidavit of , filed the day of , 18 , and : It is ordered that , And that the costs of this application be

Dated the day of , 18 .

No. 54.

18 . No.

54. Interpleader order, No. 7.

In the High Court of Justice.
Division.

Master in Chambers.

Between *A. B.*, Plaintiff,
and
C. D., Defendant,
and between
E. F., Claimant,
and the said , execution creditor, and
the sheriff of , Respondents.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and : It is ordered that the above-named sheriff proceed to sell enough of the goods seized under the writ of fieri facias issued in this action to satisfy the expenses of the said sale, the rent (if any) due, the claim of the claimant, and this execution: And it is further ordered that out of the proceeds of the said sale (after deducting the expenses thereof, and rent, if any), the said sheriff pay to the claimant the amount of his said claim, and to the execution creditor the amount of his execution, and the residue, if any, to the defendant : And it is further ordered that no action be brought against the said sheriff, and that the costs of this application be

Dated the day of , 18 .

Act 1875, Appx. H. Nos. 55, 56.

No. 55.

18 . No.

In the High Court of Justice.
Division.

Master in Chambers.

55. Order dismissing summons (generally.)

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and : It is ordered that the application of be dismissed [*If the dismissal is with costs add these words*] with costs to be taxed and paid by the to the

Dated the day of , 18 .

No. 56.

In the High Court of Justice.

56. Summons for entry of satisfaction on a registered bill of sale.

In the matter of a bill of sale by to , dated the day of , 18 , and registered on the day of , 18 . Let all parties concerned attend the Registrar of Bills of Sale at the Central Office, Royal Courts of Justice, London, on the day of , 18 , at o'clock in the noon, on the hearing of an application on the part of that satisfaction be entered on the above-mentioned bill of sale.

Dated the day of , 18 .

This summons was taken out by of

To

I. RULES OF THE SUPREME COURT (COSTS) (*a*).

Order I.

ORDER I.

Printing depositions.

Where any written deposition of a witness has been filed for use on a trial, such deposition shall be printed, unless otherwise ordered.

Order II.

ORDER II.

Rules as to printing; when not to apply.

The Rules of Court as to printing depositions and affidavits to be used on a trial shall not apply to depositions and affidavits which have previously been used upon any proceeding without having been printed.

Order III.

ORDER III.

Printing affidavits by consent or order.

Other affidavits than those required to be printed by Order XXXVIII., Rule 6, in the schedule to the Supreme Court of Judicature Act, 1875, may be printed if all the parties interested consent thereto, or the Court or Judge so order.

See O. XXXVIII., r. 6, *ante*, p. 349.

Order IV.

ORDER IV.

Printing special case.

The third Rule of the Order XXXIV. in the first schedule to the Supreme Court of Judicature Act, 1875, *shall apply to a special case, pursuant to the Act of* 13 & 14 *Victoria, c.* 35.

(*a*) These rules were issued under s. 17 of the Act of 1875, *ante*, p. 109, by Order in Council of 12th August, 1875, under the title of "Additional Rules of Court." The title "Rules of the Supreme Court (Costs)," is given by R. S. C., Dec., 1875. The rules as issued have no marginal notes.

This order is annulled by rule 64 of R. S. C., April, 1880, which is as follows:— Order IV.—V. rr. 1—5.

ORDER IVA. Order IVa.

Order IV. of the additional Rules of the Supreme Court (Costs) is hereby annulled. Special case.

See O. XXXIV., r. 7, *ante*, p. 308.

ORDER V. Order V.

When, pursuant to Rules of Court, any pleading, special case, petition of right, deposition or affidavit is to be printed, and where any printed or other office copy thereof is to be taken, the following regulations (*b*) shall be observed:— Regulations as to printing.

1. The party on whose behalf the deposition or affidavit is taken and filed is to print the same in the manner provided by Rule 2 of Order LVI. in the first schedule to the Supreme Court of Judicature Act, 1875. R. 1. Who to print.

See O. LVI., r. 2, *ante*, p. 411. As to affidavits generally see O. XXXVII. rr. 3a—3g, *ante*, pp. 342 to 344.

2. To enable the party printing, to print any deposition, the officer with whom it is filed shall on demand deliver to such party a copy written on draft paper on one side only. R. 2. Depositions.

3. The party printing shall, on demand in writing, furnish to any other party or his solicitor any number of printed copies, not exceeding ten, upon payment therefor at the rate of 1d. per folio for one copy, and ½d. per folio for every other copy. R. 3. Furnishing printed copies.

4. The solicitor of the party printing shall give credit for the whole amount payable by any other party for printed copies. R. 4. Credit.

5. The party entitled to be furnished with a print shall not be allowed any charge in respect of a written copy, unless the Court or Judge shall otherwise direct. R. 5. Written copies.

(*b*) These regulations are founded on Chan. Gen. Ord. of 16th May, 1862; Morgan's Acts and Orders, pp. 634—6, ed. 4; Dan. Ch. Pr., pp. 797—9, ed. 5.

Order V. rr. 6—12.

R. 6. Office copies.

6. The party by or on whose behalf any deposition, affidavit, or certificate is filed shall leave a copy with the officer with whom the same is filed, who shall examine it with the original and mark it as an office copy; such copy shall be a copy printed as above provided where such deposition or affidavit is to be printed.

R. 7. Production thereof.

7. The party or solicitor who has taken any printed or written office copy of any deposition or affidavit is to produce the same upon every proceeding to which the same relates.

R. 8. Furnishing copies, where not printed.

8. Where any party is entitled to a copy of any deposition, affidavit, proceeding, or document filed or prepared by or on behalf of another party, which is not required to be printed, such copy shall be furnished by the party by or on whose behalf the same has been filed or prepared.

R. 9. Application for copies.

9. The party requiring any such copy, or his solicitor, is to make a written application to the party by whom the copy is to be furnished, or his solicitor, with an undertaking to pay the proper charges, and thereupon such copy is to be made and ready to be delivered at the expiration of twenty-four hours after the receipt of such request and undertaking, or within such other time as the Court or Judge may in any case direct, and is to be furnished accordingly upon demand and payment of the proper charges.

R. 10. In ex parte cases.

10. In the case of an ex parte application for an injunction or writ of ne exeat regno, the party making such application is to furnish copies of the affidavits upon which it is granted upon payment of the proper charges immediately upon the receipt of such written request and undertaking as aforesaid, or within such time as may be specified in such request, or may have been directed by the Court.

R. 11. Foot note of party filing affidavit.

11. It shall be stated in a note at the foot of every affidavit filed on whose behalf it is so filed, and such note shall be printed on every printed copy of an affidavit or set of affidavits, and copied on every office copy and copy furnished to a party.

R. 12. Endorsement of name and

12. The name and address of the party or solicitor by whom any copy is furnished is to be endorsed thereon in like manner as upon proceedings in Court, and such party

or solicitor is to be answerable for the same being a true copy of the original, or of an office copy of the original, of which it purports to be a copy, as the case may be.

address on copy furnished.

R. 13. Marking folios.

13. The folios of all printed and written office copies, and copies delivered or furnished to a party, shall be numbered consecutively in the margin thereof, and such written copies shall be written in a neat and legible manner on the same paper as in the case of printed copies.

R. 14. Course where copy is not furnished on request.

14. In case any party or solicitor who shall be required to furnish any such written copy as aforesaid shall either refuse or, for twenty-four hours from the time when the application for such copy has been made, neglect to furnish the same, the person by whom such application shall be made shall be at liberty to procure an office copy from the office in which the original shall have been filed, and in such case no costs shall be due or payable to the solicitor so making default in respect of the copy or copies so applied for.

R. 15. Expense of printing by order of Court or Judge.

15. Where, by any order of the Court (whether of appeal or otherwise) or a Judge, any pleading, evidence, or other document is ordered to be printed, the Court or Judge may order the expense of printing to be borne and allowed, and printed copies to be furnished by and to such parties and upon such terms as shall be thought fit.

ORDER VI.

Order VI.

Scales of costs:

The following regulations as to costs of proceedings in the Supreme Court of Judicature shall regulate such costs from the commencement of the Supreme Court of Judicature Acts, 1873 and 1875 (*a*) :—

R. 1. Lower scale.

1. Solicitors shall be entitled to charge and be allowed the fees set forth in the column headed "lower scale" in the schedule hereto—

In all actions for purposes to which any of the forms of indorsement of claim on writs of summons in Sections II., IV., and VII. in Part II. of Appendix A., referred to in

(*a*) These regulations are founded on the regulations as to solicitors' fees and charges subjoined to the Chan. Cons. Orders; Morgan, Appx. pp. xxxiii., *et seq.*, ed. 4; Forms to Dan. Ch. Pr., pp. 1545, *et seq.*, ed. 2.

Order VI. r. 1.

the third Rule of Order III. in the schedule to the Supreme Court of Judicature Act, 1875, or other similar forms, are applicable (except as after provided in actions for injunctions);

See note to rule 2, *post*.

In all causes and matters by the 34th section of the Supreme Court of Judicature Act, 1873, assigned to the Queen's Bench Division of the Court;

See Act of 1873, s. 34, *ante*, p. 47.

In all causes and matters by the 34th section of the said Act assigned to the Common Pleas Division of the Court;

See last note.

In all causes and matters by the 34th section of the said Act assigned to the Exchequer Division of the Court;

See last note.

In all causes and matters by the 34th section of the said Act assigned to the Probate, Divorce, and Admiralty Division of the Court;

See Act of 1873, s. 34, *ante*, p. 47.

And also in causes and matters by the 34th section of the said Act assigned to the Chancery Division of the Court in the following cases; (that is to say,)

See Act of 1873, s. 34, *ante*, p. 47.

1. By creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs-at-law or next-of-kin, in which the personal or real or personal and real estate for or against or in respect of which or for an account or administration of which the demand may be made shall be under the amount or value of 1000*l*.

2. For the execution of trusts or appointment of new trustees in which the trust estate or fund shall be under the amount or value of 1000*l*.

3. For dissolution of partnership or the taking of partnership or any other accounts in which the partnership assets or the estate or fund shall be under the amount or value of 1000*l*.

4. For foreclosure or redemption, or for enforcing any charge or lien in which the mortgage whereon the suit is founded, or the charge or lien sought to be enforced, shall be under the amount or value of 1000*l.* Order VI. rr. 1, 2.

5. And for specific performance in which the purchase money or consideration shall be under the amount or value of 1000*l.*

6. In all proceedings under the Trustees Relief Acts, or under the Trustee Acts, or under any of such Acts, in which the trust estate or fund to which the proceeding relates shall be under the amount or value of 1000*l.*

7. In all proceedings relating to the guardianship or maintenance of infants in which the property of the infant shall be under the amount or value of 1000*l.*

8. In all proceedings by original special case, and in all proceedings relating to funds carried to separate accounts, and in all proceedings under any Railway or Private Act of Parliament, or under any other statutory or summary jurisdiction, and generally in all other cases where the estate or fund to be dealt with shall be under the amount or value of 1000*l.*

As to certifying that the lower scale is applicable, see *post*, p. 636, *et seq.* See note to next rule.

2. Solicitors shall be entitled to charge and be allowed the fees set forth in the column headed "higher scale" in the schedule hereto; in all actions for special injunctions to restrain the commission or continuance of waste, nuisances, breaches of covenant, injuries to property and infringement of rights, easements, patents and copyrights, and other similar cases where the procuring such injunction is the principal relief sought to be obtained, and in all cases other than those to which the fees in the column headed "lower scale" are hereby made applicable. R. 2. Higher scale.

In an action for trespass to land, plaintiff obtained an injunction as well as damages. The trespass did not involve any assertion of title or permanent injury to the land. Costs on the higher scale were disallowed. *Chapman* v. *Midland Railway*, 5 Q. B. D. 431, C. A. In an action for damages against the lessees of a market for breaches of their covenants, plaintiff also obtained an

Order VI. rr. 2—4. injunction, and costs on the higher scale were allowed by the judge. *Horner* v. *Oyler*, 49 L. J. C. P. 655. In an action on a bill of exchange in the Chancery Division which involved a difficult question of partnership law, costs on the higher scale were allowed by the judge. *Pooley* v. *Driver*, 5 Ch. D. 459, M. R. In an action for damages to try a right to a church in which an injunction was claimed, costs on the higher scale were refused. *Duke of Norfolk* v. *Arbuthnot*, 6 Q. B. D. 279. See also *Re Sanderson*, 7 Ch. D. 176, administration action; and *Rogers* v. *Jones*, 7 Ch. D. 345, action by legatee for compensation.

R. 3. Court or Judge may adopt either scale.

3. Notwithstanding these Rules, the Court or Judge may in any case direct the fees set forth in either of the said two columns to be allowed to all or either or any of the parties, and as to all or any part of the costs.

See note to last rule. The power given by this rule cannot be delegated by the judge to the taxing officer. *Corticine Floor Co.* v. *Tull*, 27 W. R. 273, C. A.

R. 4. Interpretation of terms.

4. The provisions of Order LXIII. in the first schedule to the Supreme Court of Judicature Act, 1875, shall apply to these Rules.

See *ante*, p. 444.

Schedule.

SCHEDULE TO THE RULES OF THE SUPREME COURT (COSTS).

An Order or Rule herein referred to by number shall mean the Order or Rule so numbered in the First Schedule to the Supreme Court of Judicature Act, 1875.

Writs, &c.

WRITS, SUMMONSES, AND WARRANTS.

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
Writ of summons for the commencement of any action -	0	6	8	0	13	4
And for endorsement of claims, if special - - - - -	0	5	0	0	5	0
Concurrent writ of summons -	0	6	8	0	6	8
Renewal of a writ of summons -	0	6	8	0	6	8
Notice of a writ for service in lieu of writ out of jurisdiction	0	4	0	0	5	0
Writ of inquiry - - - -	1	1	0	1	1	0
Writ of mandamus or injunction	0	10	0	1	1	0
Or per folio - - - - -	0	1	4	0	1	4

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.	Schedule.
Writ of subpœna ad testificandum duces tecum - - - -	0	6	8	0	6	8	
And if more than four folios, for each folio beyond four - -	0	1	4	0	1	4	
Writ or writs of subpœna ad testificandum for any number of persons not exceeding three, and the same for every additional number not exceeding three - - - - - -	0	6	8	0	6	8	
Writ of distringas, pursuant to statute 5 Vict. c. 8 - -	0	13	4	0	13	4	
The statute intended to be referred to is 5 Vict. c. 5: see O. XLVI., r. 2, *ante*, p. 380.							
Writ of execution, or other writ to enforce any judgment or order	0	7	0	0	10	0	
And if more than four folios, for each folio beyond four - -	0	1	4	0	1	4	
Procuring a writ of execution or notice to the sheriff, marked with a seal of renewal - -	0	6	8	0	6	8	
Notice thereof to serve on sheriff	0	4	0	0	5	0	
Any writ not included in the above - - - - - -	0	7	0	0	10	0	
These fees include all endorsements and copies, or præcipes, for the officer sealing them, and attendances to issue or seal, but not the Court fees.							
Summons to attend at Judges' Chambers - - -	0	3	0	0	6	8	
Or if special, at taxing officer's discretion, not exceeding -	0	6	8	1	1	0	
Copy for the Judge, when required	0	2	0	0	2	0	
Or per folio - - - - -		—		0	0	4	
Original summons for proceedings in Chambers in the Chancery Division - - - - -	0	13	4	1	1	0	
And attending to get same and duplicate sealed, and at the proper office to file duplicate and get copies for service stamped -	0	13	4	0	13	4	
Copy for the Judge - - -	0	2	0	0	2	0	
Or per folio - - - - -		—		0	0	4	

Schedule.		Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
	Endorsing same and copies under 8th rule of the 35th of the Consolidated General Orders of the Court of Chancery - - -	0	6	8	0	6	8

For this rule, see Morgan, p. 546, ed. 4; Dan. Ch. Pr. p. 1052. ed. 5.

Services, &c.

SERVICES, NOTICES, AND DEMANDS.

Service of any writ, summons, warrant, interrogatories, petition, order, notice, or demand on a party who has not entered an appearance, and if not authorised to be served by post -	0	5	0	0	5	0
If served at a distance of more than two miles from the nearest place of business, or office of the solicitor serving the same, for each mile beyond such two miles therefrom - - - - -	0	1	0	0	1	0
Where in consequence of the distance of the party to be served, it is proper to effect such service through an agent (other than the London agent), for correspondence in addition - -	0	7	0	0	7	0
Where more than one attendance is necessary to effect service, or to ground an application for substituted service, such further allowance may be made as the taxing officer shall think fit.						
For service out of the jurisdiction such allowance is to be made as the taxing officer shall think fit.						
Service where an appearance has been entered on the solicitor or party - - - - - -	0	2	6	0	2	6
Or if authorised to be served by post - - - - - -	0	1	6	0	1	6
Where any writ, order, and notice, or any two of them, have to be served together, one fee only for service is to be allowed.						
In addition to the above fees, the						

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.	Schedule.
following allowances are to be made :—							
As to writs, if exceeding two folios, for copy for service, per folio beyond such two - -	0	0	4	0	0	4	
As to summons to attend at the Judges' Chambers, for each copy to serve - - - - -	0	1	0	0	2	0	
Or per folio - - - - -	0	0	4	0	0	4	
As to notices in proceedings to wind up companies, for preparing or filling up each notice to creditors to attend and receive debts, and to contributories to settle list of contributories -	0	1	0	0	1	0	
And for preparing or filling up each notice to contributories to be served with a general order for a call, or an order for payment of a call - - -	0	1	0	0	1	0	
And for drawing notice to be served on contributories or creditors of a meeting, per folio	0	1	0	0	1	0	
For each copy of the last-mentioned notice to serve, per folio	0	0	4	0	0	4	
For preparing or filling up for service in any other cause or matter, each notice to creditors to prove claims, and each notice that cheques may be received, specifying the amount to be received for principal and interest, and costs, if any - -	0	1	0	0	1	0	
For preparing notice to produce or admit, and one copy - -	0	5	0	0	7	6	
If special or necessarily long, such allowance as the taxing officer shall think proper, not exceeding per folio - - - -	0	0	8	0	1	4	
And for each copy beyond the first, such allowance as the taxing master shall think proper, not exceeding per folio - -	0	0	4	0	0	4	
For preparing notice of motion -	0	2	0	0	5	0	
Or per folio - - - - -	0	1	0	0	1	0	

Schedule.		Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
	Copy for service - - -	0	1	0	0	1	0
	Or per folio - - - -		—		0	0	4
	For preparing any necessary or proper notice, not otherwise provided for and demand -	0	1	6	0	1	6
	Or if special, and necessarily exceeding three folios, for preparing same, for each folio beyond three - - -	0	1	0	0	1	0
	And for each copy for service, per folio beyond such three - -	0	0	4	0	0	4
	Copies for service of interrogatories and petitions, and of orders with necessary notices (if any) to accompany, per folio	0	0	4	0	0	4
	Except as otherwise provided, the allowance for services include copies for service.						
	Where notice of filing affidavits is required, only one notice is to be allowed for a set of affidavits filed, or which ought to be filed together.						
	In proceedings to wind up a company, the usual charges relating to printing shall be allowed in lieu of copies for service, where the fee for copies would exceed the charges for printing, and amount to more than £3.						
	Where any appointment is or ought to be adjourned, service of a notice of the adjournment or next appointment, is not to be allowed.						
Appearances.	APPEARANCES.						
	Entering any appearance - -	0	6	8	0	6	8
	If entered at one time, for more than one person, for every defendant beyond the first - -	0	1	0	0	2	0
	If a person appearing to a writ of summons to recover land						

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.	Schedule.
limits his defence by his memorandum of appearance, in addition to the above - - -	0	6	8	0	6	8	
INSTRUCTIONS.							Instructions.
To sue or defend - - -	0	6	8	0	13	4	
For statement of complaint -	0	13	4	2	2	0	
For statement or further statement of defence - - - - -	0	6	8	0	13	4	
For counter-claim - - -	0	6	8	0	13	4	
For reply by plaintiff when defendant sets up a counter-claim	0	13	4	1	1	0	
For reply or further reply in any other case by plaintiff or other person, with or without joinder of issue - - - - -	0	6	8	0	13	4	
For confession of defence - -	0	6	8	0	13	4	
For joinder of issue without other matter and for demurrer -	0	6	8	0	13	4	
For special case, special petition, any other pleading (not being a summons), and interrogatories for examination of a party or witness - - - - -	0	6	8	0	13	4	
To amend any pleading - -	0	6	8	0	13	4	
For affidavit in answer to interrogatories, and other special affidavits - - - - -	0	6	8	0	6	8	
To appeal - - - - -	0	13	4	1	1	0	
To add parties by order of Court or Judge - - - - -	0	6	8	0	13	4	
For counsel to advise on evidence when the evidence in chief is to be taken orally - - -	0	6	8	0	6	8	
Or not to exceed - - -	0	13	4	1	1	0	
For counsel to make any application to a Court or Judge where no other brief - - - -	0	6	8	0	10	0	
For brief on motion for special injunction - - - - -	0	13	4	1	1	0	
For brief on hearing or trial of action upon notice of trial given, whether such trial be before a Judge, with or without							

Schedule.		Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
	a jury, or before an official or special referee, or on trial of an issue of fact before a Judge, commissioner, or referee, or on assessment of damages - -	1	1	0	2	2	0
	For such brief, and for brief on the hearing of an appeal when witnesses are to be examined or cross-examined, such fee may be allowed as the taxing officer shall think fit, having regard to all the circumstances of the case, and to other allowances, if any, for attendances on witnesses and procuring evidence.						
	The fees for instructions for brief are not to apply to a hearing on further consideration.						
Drawing pleadings, &c.	DRAWING PLEADINGS AND OTHER DOCUMENTS.						
	Statement of claim - - -	0	10	0	1	1	0
	Or per folio - - - -	0	1	0	0	1	0
	Statement of defence - - -	0	5	0	0	10	0
	Or per folio - - - -	0	1	0	0	1	0
	Statement of defence and counter-claim - - - - -	0	5	0	1	1	0
	Or per folio - - - -	0	1	0	0	1	0
	Reply, with or without joinder of issue, confession of defence, joinder of issue without other matter, demurrer, and any other pleading (not being a petition or summons) and amendments of any pleading - - -	0	5	0	0	10	0
	Or per folio - - - -	0	1	0	0	1	0
	Particulars, breaches, and objections, when required, and one copy to deliver - - -	0	5	0	0	6	8
	Or such amount as the taxing officer shall think fit, not exceeding per folio - -	0	0	8	0	1	4
	If more than one copy to be delivered, for each other copy per folio - - - -	0	0	4	0	0	4

	Lower Scale. £.	s.	d.	Higher Scale. £	s.	d.	Schedule.
Special case, whether original or in an action, affidavits in answer to interrogatories and other special affidavits, special petitions, and interrogatories, per folio	0	1	0	0	1	0	
Brief, on trial or hearing of cause, issue of fact, assessment of damages, examination of witnesses, demurrer, special case and petition before a Court or judge, sheriff, commissioner, referee, examiner, or officer of the court, when necessary and proper in addition to pleadings, including necessary and proper observations, per folio	0	1	0	0	1	0	
Brief on application to add parties	0	6	8	0	10	0	
Or per folio	0	1	0	0	1	0	
Brief on further consideration, per sheet of 10 folios	0	6	8	0	6	8	
Accounts, statements, and other documents for the Judges' Chambers, when required, and fair copy to leave, per folio	0	0	8	0	1	4	
Advertisements to be signed by Judges' clerk, including attendance therefor	0	6	8	0	13	4	
Bill of costs for taxation, including copy for the taxing officer [? at per folio]	0	0	8	0	0	8	
COPIES.							Copies.
Of pleadings, briefs, and other documents where no other provision is made, at per folio	0	0	4	0	0	4	
Where, pursuant to Rules of Court any pleading, special case or petition of right, or evidence is printed, the solicitor of the party printing shall be allowed for a copy for the printer (except when made by the officer of the court), at per folio	0	0	4	0	0	4	

Schedule.	Lower Scale. £ s. d.	Higher Scale. £ s. d.
And for examining the proof print, at per folio - - - - -	0 0 2	0 0 2
And for printing the amount actually and properly paid to the printer, not exceeding per folio (*a*) - - - - -	0 1 0	0 1 0
And in addition for every 20 beyond the first 20 copies, at per folio (*a*) - - - - -	0 0 1	0 0 1
And where any part shall properly be printed in a foreign language, or as a fac-simile, or in any unusual or special manner, or where any alteration in the document being printed becomes necessary after the first proof, such further allowance shall be made as the taxing officer shall think reasonable.		
These allowances are to include all attendances on the printer.		
The solicitor for a party entitled to take printed copies shall be allowed, for such number of copies as he shall necessarily or properly take, the amount he shall pay therefor.		
In addition to the allowances for printing and taking printed copies there shall be allowed for such printed copies as may be necessary or proper for the following, but no other purposes (videlicet) :—		
Of any pleading for delivery to the opposite party, or filing in default of appearance - -		
Of any special case for filing -		
Of any petition of right for presentation, if presented in print,		

(*a*) By R. S. C., June, 1876, r. 20, these provisions are altered as follows :—"The allowance for printing a document not exceeding ten folios, shall be 10*s*., and, in addition, for every twenty beyond the first twenty copies of any document not exceeding twenty-four folios, 2*s*."

	Lower Scale. £ s. d.	Higher Scale. £ s. d.	Schedule.
and for the solicitor of the Treasury, and service on any party - - - - - -			
Of any pleading, special case, or petition of right, for the use of the Court or Judge - -			
Of any affidavit to be sworn to in print - - - - - -			
And of any pleading, special case, petition of right, or evidence for the use of counsel in Court, and in country agency causes when proper to be sent as a close copy for the use of the country solicitor, at per folio -	0 0 2	0 0 3	
Such additional allowances for printed copies for the Court or judge, and for counsel, are not to be made where written copies have been made previously to printing, and are not in any case to be made more than once in the progress of the cause.			
Close copies, whether printed or written, are not to be allowed as of course, but the allowance is to depend on the propriety of making or sending the copies, which in each case is to be shown and considered by the taxing officer.			
Inserting amendments in a printed copy of any pleading, special case, or petition of right, when not reprinted -	0 1 0	0 5 0	
Or per folio - - - - -	0 0 4	0 0 4	
PERUSALS.			Perusals.
Of statement of complaint, statement of defence, reply, joinder of issue, demurrer, and other pleading (not being a petition			

Schedule.		Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
	or summons) by the solicitor of the party to whom the same are delivered - - -	0	6	8	0	13	4
	Or per folio - - - -		—		0	0	4
	Of amendment of any such pleading in writing - -	0	6	8	0	6	8
	Or per folio - - - -		—		0	0	4
	If same reprinted - - -	0	6	8	0	13	4
	Or per folio of amendment - -		—		0	0	4
	Of interrogatories to be answered by a party by his solicitor -	0	6	8	0	13	4
	Or per folio - - - -		—		0	0	4
	Of special case by the solicitor of any party except the one by whom it is prepared - -	0	6	8	0	13	4
	Or per folio - - - -		—		0	0	4
	Of copy order to add parties, notice of defendant's claim against any person not a party to the action under Order XVI., Rule 18 [*ante*, p. 240], and of defendant's statement of defence and counter claim served on a person not a party under Order XXII., Rule 6 [*ante*, p. 269], by the solicitor of the party served therewith, and in these several cases the perusal of the plaintiff's statement of complaint is also to be allowed unless the solicitor has been previously allowed such perusal	0	6	8	0	13	4
	Or per folio - - - -		—		0	0	4
	Of notice to produce and notice to admit by the solicitor of the party served - - - -	0	6	8	0	13	4
	Of affidavit in answer to interrogatories by the solicitor of the party interrogating, and of other special affidavits by the solicitor of the party against whom the same can be read, per folio - - - .	0	0	4	0	0	4

ATTENDANCES.

Schedule. Attendances.

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
To obtain consent of next friend to sue in his name - - -	0	6	8	0	13	4
To deliver or file any pleading (not being a petition or summons) and a special case -	0	3	4	0	6	8
To inspect, or produce for inspection, documents pursuant to a notice to admit - - - -	0	6	8	0	13	4
Or per hour - - - - -	0	6	8	0	6	8
To examine and sign admissions	0	6	8	0	13	4
To inspect, or produce for inspection, documents referred to in any pleading or affidavit, pursuant to notice under Order XXXI., Rule 14 [*ante*, p. 300]	0	6	8	0	6	8
Or per hour - - - - -	0	6	8	0	6	8
To obtain or give any necessary or proper consent - - -	0	6	8	0	6	8
To obtain an appointment to examine witnesses - - - -	0	6	8	0	6	8
On examination of witnesses before any examiner, commissioner, officer, or other person	0	13	4	0	13	4
Or according to circumstances, not to exceed - - - -	2	2	0	2	2	0
Or if without counsel, not to exceed - - - - - -		—		3	3	0
On deponents being sworn, or by a solicitor or his clerk to be sworn, to an affidavit in answer to interrogatories or other special affidavit - - - -	0	6	8	0	6	8
On a summons at Judges' Chambers - - - - - -	0	6	8	0	6	8
Or according to circumstances not to exceed - - - -	1	1	0	1	1	0
In the Chancery Division, all allowances for attending at the Judges' Chambers are to be by the Judge or chief clerk as heretofore.						

Schedule.	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
To file chief clerks' and taxing masters' certificates, and get copy marked as an office copy	0	6	8	0	6	8
On counsel with brief or other papers—						
If counsel's fee one guinea -	0	3	4	0	6	8
If more and under five guineas - - - -	0	6	8	0	6	8
If five guineas and under 20 guineas - - - -	0	6	8	0	13	4
If 20 guineas - - -	0	13	4	1	1	0
If 40 guineas or more -		—		2	2	0
On consultation or conference with counsel - - - -	0	13	4	0	13	4
To enter or set down action, demurrer, special case, or appeal, for hearing or trial -	0	6	8	0	6	8
In Court on motion of course and on counsel and for order -	0	10	0	0	13	4
To present petition for order of course and for order - -	0	6	8	0	13	4
In Court on every special motion each day - - - - -	0	6	8	0	13	4
On same when heard each day -	0	13	4	0	13	4
Or according to circumstances -	1	1	0	2	2	0
On demurrer, special case, or special petition, or application adjourned from the Judges' Chambers, when in the special paper for the day, or likely to be heard - - - - -	0	6	8	0	10	0
On same when heard - - -	0	13	4	1	1	0
Or according to circumstances, not to exceed - - - -	1	1	0	2	2	0
On hearing or trial of any cause, or matter, or issue of fact, in London or Middlesex, or the town where the solicitor resides or carries on business, whether before a Judge with or without a jury, or commissioner, or referee, or on assessment of damages, when in the paper - -	0	10	0	0	10	0
When heard or tried - - -	0	13	4	1	1	0
Or according to circumstances -	2	2	0	2	2	0

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.	Schedule.
When not in London or Middlesex, nor in the town where the solicitor resides or carries on business, for each day (except Sundays) he is necessarily absent	2	2	0	3	3	0	
And expenses (besides actual reasonable travelling expenses) each day, including Sundays	1	1	0	1	1	0	
Or if the solicitor has to attend on more than one trial or assessment at the same time and place, in each case	1	1	0	1	11	6	
The expenses in such case to be rateably divided.							
To hear judgment when same adjourned	0	6	8	0	13	4	
Or according to circumstances	0	13	4	1	1	0	
To deliver papers (when required) for the use of a judge prior to a hearing	0	6	8	0	6	8	
If more than one judge	0	13	4	0	13	4	
On taxation of a bill of costs	0	6	8	0	6	8	
Or according to circumstances, not to exceed	2	2	0	2	2	0	
In causes for purposes within the cognizance of the Court of Chancery before the Act passed, such further fee as the taxing officer may think fit, not exceeding the allowances heretofore made.							
To obtain or give an undertaking to appear	0	6	8	0	6	8	
To present a special petition, and for same answered	0	6	8	0	6	8	
On printer to insert advertisement in Gazette	0	6	8	0	6	8	
On printer to insert same in other papers, each printer		—		0	6	8	
Or every two	0	6	8		—		
On registrar to certify that a cause set down is settled, or for any reason not to come into the paper for hearing	0	6	8	0	6	8	

Schedule.		Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
	For an order drawn up by chief clerk, and to get same entered - - - - -	0	6	8	0	6	8
	On counsel to procure certificate that cause proper to be heard as a short cause, and on registrar to mark same - -	0	6	8	0	6	8
	To mark conveyancing counsel or taxing master - - - -	0	6	8	0	6	8
	For preparing and drawing up an order made at chambers in proceedings to wind-up a company and attending for same, and to get same entered - - -	0	13	4	0	13	4
	And for engrossing every such order, per folio - - -	0	0	4	0	0	4
	NOTE.—An order of course means an order on an ex parte application, and to which a party is entitled as of right on his own statement and at his own risk.						
Oaths and exhibits.	OATHS AND EXHIBITS.						
	Commissioners to take oaths or affidavits. For every oath, declaration, affirmation, or attestation upon honour in London or the country - - - -	0	1	6	0	1	6
	The solicitor for preparing each exhibit in town or country -	0	1	0	0	1	0
	The commissioner for marking each exhibit - - - - -	0	1	0	0	1	0
Term fees.	TERM FEES.						
	For every term commencing on the day the sittings in London and Middlesex of the High Court of Justice commence, and terminating on the day preceeding the next such sittings, in which a proceeding in the						

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.	Schedule.
cause or matter, by or affecting the party other than the issuing and serving the writ of summons, shall take place -	0	15	0	0	15	0	
And further, in country agency causes or matters, for letters -	0	6	0	0	6	0	
Where no proceeding in the cause or matter is taken which carries a term fee, a charge for letters may be allowed if the circumstances require it.							
In addition to the above an allowance is to be made for the necessary expense of postages, carriage and transmission of documents.							

Special Allowances and General Provisions.

Special allowances.

1. As to writs of summons requiring special indorsement, original special cases, pleadings and affidavits in answer to interrogatories, and other special affidavits, when the higher scale is applicable, the taxing officer may, in lieu of the allowances for instructions and preparing or drawing, make such allowance for work, labour, and expenses in or about the preparation of such documents as in his discretion he may think proper.

R. 1. Preparation of special documents.

2. As to drawing any pleading or other document, the fees allowed shall include any copy made for the use of the solicitor, agent, or client, or for counsel to settle.

R. 2. Copy of document for use.

3. As to instructions to sue or defend, when the higher scale is applicable, if in consequence of the instructions being taken separately from more than three persons (not being co-partners) the taxing officer shall consider the fee above provided inadequate, he may make such further allowance as he shall in his discretion consider reasonable.

R. 3. Instructions to sue or defend.

4. As to affidavits, when there are several deponents to be sworn, or it is necessary for the purpose of an affidavit being sworn to go to a distance, or to employ an agent,

R. 4. Affidavits.

Special allowances. such reasonable allowance may be made as the taxing officer in his discretion may think fit.

R. 5. Attendances to settle affidavits.

5. The allowances for instructions and drawing an affidavit in answer to interrogatories and other special affidavits, and attending the deponent to be sworn, include all attendances on the deponent to settle and read over.

R. 6. Services.

6. As to delivery of pleadings, services, and notices, the fees are not to be allowed when the same solicitor is for both parties, unless it be necessary for the purpose of making an affidavit of service.

R. 7. Perusals.

7. As to perusals the fees are not to apply where the same solicitor is for both parties.

R. 8. Evidence.

8. As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed.

As to fees paid to surveyors who reported and qualified themselves for examination as witnesses, see *Mackley* v. *Chillingworth*. 2 C. P. D. 273. The taxing officer is no longer bound by the old scales or rules. He must exercise his discretion on the matters which fall under this rule. *Turnbull* v. *Janson*, 3 C. P. D., 264.

R. 9. Agency correspondence.

9. As to agency correspondence, in country agency causes and matters, if it be shown to the satisfaction of the taxing officer that such correspondence has been special and extensive, he is to be at liberty to make such special allowance in respect thereof as in his discretion he may think proper.

R. 10. Attendances at judges' chambers.

10. As to attendances at the Judges' Chambers, where from the length of the attendance, or from the difficulty of the case, the judge or master shall think the highest of the above fees an insufficient remuneration for the services performed, or where the preparation of the case or matter to lay it before the judge or master in chambers, or on a summons, shall have required skill and labour for which no fee has been allowed, the judge or master may allow such fee in lieu of the fee of 1*l.* 1*s.* above provided not exceeding 2*l.* 2*s.*, or where the higher scale is applicable 3*l.* 3*s.*, or in proceedings to wind up a company 5*l.* 5*s.*, as in his discretion he may think fit; and where the preparation of the case or matter to lay it before a judge at chambers on a summons shall have required and received from the solicitor such extraordinary skill and

labour as materially to conduce to the satisfactory and speedy disposal of the business, and therefore shall appear to the judge to deserve higher remuneration than the ordinary fees, the judge may allow to the solicitor by a memorandum in writing expressly made for that purpose and signed by the judge, specifying distinctly the grounds of such allowance, such fee, not exceeding 10 guineas, as in his discretion he may think fit, instead of the above fees of 2*l.* 2*s.*, 3*l.* 3*s.*, and 5*l.* 5*s.* **Special allowances.**

See before Morgan, Appx. xlii, ed. 4.

11. As to attendances at the Judges' Chambers, where by reason of the non-attendance of any party (and it is not considered expedient to proceed *ex parte*), or where by reason of the neglect of any party in not being prepared with any proper evidence, account, or other proceeding, the attendance is adjourned without any useful progress being made, the judge may order such an amount of costs (if any) as he shall think reasonable to be paid to the party attending by the party so absent or neglectful, or by his solicitor personally; and the party so absent or neglectful is not to be allowed any fee as against any other party, or any estate or fund in which any other party is interested. **R. 11.** Abortive attendance at chambers.

This is founded on Chan. Cons. Ord. XL., r. 31; Morgan, 590. See *Simmons* v. *Storer*, 14 Ch. D. 154, as to abortive garnishee summonses.

12. A folio is to comprise 72 words, every figure comprised in a column being counted as one word. **R. 12.** Length of a folio.

And see Ord. as to Court Fees of Oct. 1875, r. 7, *post*, p. 638.

13. Such costs of procuring the advice of counsel on the pleadings, evidence, and proceedings in any cause or matter as the taxing officer shall in his discretion think just and reasonable, and of procuring counsel to settle such pleadings and specia affidavits as the taxing officer shall in his discretion think proper to be settled by counsel. are to be allowed; but as to affidavits a separate fee is not to be allowed for each affidavit, but one fee for all the affidavits proper to be so settled, which are or ought to be filed at the same time. **R. 13.** Consulting counsel.

See before Chan. Cons. Ord. XL., r. 17; Morgan, 585.

14. As to counsel attending at Judges' Chambers, no **R. 14.**

Special allowances. costs thereof shall in any case be allowed, unless the judge certifies it to be a proper case for counsel to attend.

of counsel at chambers. This is taken from Chan. Cons. Ord. XL., r. 29 ; Morgan, 589.

R. 15. Inspection of documents. 15. As to inspection of documents under Order XXXI., Rule 14, no allowance is to be made for any notice or inspection, unless it is shown to the satisfaction of the taxing officer that there were good and sufficient reasons for giving such notice and making such inspection.

See R. S. C., O. XXXI., r. 14, *ante*, p. 300, and see *Brown* v. *Sewell*, C. A. 16 Ch. D. 517.

R. 16. Copies of documents in possession of another party. 16. As to taking copies of documents in possession of another party, or extracts therefrom under Rules of Court or any special order, the party entitled to take the copy or extract is to pay the solicitor of the party producing the document for such copy or extract as he may, by writing, require, at the rate of 4*d.* per folio ; and if the solicitor of the party producing the document refuses or neglects to supply the same, the solicitor requiring the copy or extract is to be at liberty to make it, and the solicitor for the party producing is not to be entitled to any fee in respect thereof.

For the former practice in Chancery, see Dan. Ch. Pr. 1696. ed. 5.

R. 17. Tender of costs on service of petition. 17. Where a petition in any cause or matter assigned to the Chancery Division is served, and notice is given to the party served that in case of his appearance in Court his costs will be objected to, and accompanied by a tender of costs for perusing the same, the amount to be tendered shall be 2*l.* 2*s.* The party making such payment shall be allowed the same in his costs, provided such service was proper, but not otherwise ; but this order is without prejudice to the rights of either party to costs, or to object to costs where no such tender is made, or where the Court or judge shall consider the party entitled, notwithstanding such notice or tender to appear in Court. In any other case in which a solicitor of a party served necessarily or properly peruses any such petition without appearing thereon he is to be allowed a fee not exceeding 2*l.* 2*s.*

Perusing without appearing.

R. 18. Disallowance of costs of unnecessary proceeding. 18. The Court or Judge may, at the hearing of any cause or matter, or upon any application or procedure in any cause or matter in Court or at chambers, and whether the same is objected to or not, direct the costs of any pleading, affidavit, evidence, notice to cross-examine

witnesses, account, statement, or other proceeding, or any part thereof, which is improper, unnecessary, or contains unnecessary matter, or is of unnecessary length, to be disallowed, or may direct the taxing officer to look into the same and to disallow the costs thereof, or of such part thereof as he shall find to be improper, unnecessary, or to contain unnecessary matter, or to be of unnecessary length; and in such case the party whose costs are so disallowed shall pay the costs occasioned to the other parties by such unnecessary proceeding, matter, or length; and in any case where such question shall not have been raised before and dealt with by the Court or Judge, the taxing officer may look into the same (and, as to evidence, although the same may be entered as read in any decree or order) for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so. Special allowances.

This rule is founded on Chan. Cons. Ord. XL., rr. 9, 10; Morgan 581, 582. See rule 29, *post*, p. 632, and note thereto; as to the duty of the taxing officer under this rule see *Re Wormesley*, 39 L. T. 85 M.R.

19. In any case in which, under the preceding rule No. 18, or any other rule of Court, or by the order or direction of a Court or Judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such officer may allow or certify the costs to be paid, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered. R. 19. Set-off of costs.

This rule does not apply to different actions between the same parties, but only to costs incurred in the same action or proceeding: *Barker* v. *Hemming*, 5 Q. B. D., 609 C. A. A change of solicitors is immaterial if the costs be incurred in the same proceeding. *Roberts* v. *Bute*, 8 Ch. D. 198. See *Pringle* v. *Gloag*, 10 Ch. D. 676, as to setting off a debt against taxed costs, and the solicitor's lien for costs.

20. Where in the Chancery Division any question as to any costs is under the preceding rule 18 dealt with at chambers, the chief clerk is to make a note thereof, and state the same on his allowance of the fees for attendances R. 20. Note by chief clerk of disallowance.

Special allowances.

at chambers, or otherwise as may be convenient for the information of the taxing officer.

R. 21. Unnecessary appearance at chambers.

21. Where any party appears upon any application or proceeding in Court or at chambers, in which he is not interested, or upon which, according to the practice of the Court, he ought not to attend, he is not to be allowed any costs of such appearance unless the Court or Judge shall expressly direct such costs to be allowed.

See before Chan. Cons. Ord. XL., r. 28; Morgan, 589.

R. 22. *Extension of time.*

22. *As to applications to extend the time for taking any proceeding limited by Rules of Court (subject to any special order as to the costs of and occasioned by any such application), the costs of one application are, without special order, to be allowed as costs in the cause or matter, but (unless specially ordered) no costs are to be allowed of any further application to the party making the same as against any other party, or any estate or fund in which any other party is interested.*

This rule is annulled by rule 65 of R. S. C., April, 1880, which is as follows:—

Extension of time.

22a. "Rule 22 in the schedule to the additional Rules of the Supreme Court (Costs) is hereby annulled. The costs of an application to extend the time for taking any proceeding shall, in the absence of an order by the Court or a Judge directing by whom they are to be paid, be in the discretion of the taxing master."

R 23. General powers of taxing officers.

23. The taxing officers of the Supreme Court, or of any division thereof, shall, for the purpose of any proceeding before them, have power and authority to administer oaths, and shall, in relation to the taxation of costs, perform all such duties as have heretofore been performed by any of the masters, taxing masters, registrars, or other officers of any of the courts whose jurisdiction is by the Act transferred to the High Court of Justice or Court of Appeal, and shall, in respect thereof, have such powers and authorities as previous to the commencement of the Act were vested in any of such officers, including examining witnesses, directing production of books, papers, and documents, making separate certificates or allocatur, requiring any party to be represented by a separate solicitor, and to direct and adopt all such other proceedings as could be directed and adopted by any such officer on

references for the taxation of costs, and taking accounts of what is due in respect of such costs, and such other accounts connected therewith as may be directed by the Court or a Judge. Special allowances.

See before Chan. Cons. Ord. XL., r. 1; Morgan, 575.

24. The taxing officer shall have authority to arrange and direct what parties are to attend before him on the taxation of costs to be borne by a fund or estate, and to disallow the costs of any party whose attendance such officer shall in his discretion consider unnecessary in consequence of the interest of such party in such fund or estate being small or remote, or sufficiently protected by other parties interested. R. 24. Parties to attend taxations.

25. When any party entitled to costs refuses or neglects to bring in his costs for taxation, or to procure the same to be taxed, and thereby prejudices any other party, the taxing officer shall be at liberty to certify the costs of the other parties, and certify such refusal or neglect, or may allow such party refusing or neglecting a nominal or other sum for such costs, so as to prevent any other party being prejudiced by such refusal or neglect. R. 25. Neglect to bring in or tax costs.

26. As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear to the taxing officer to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party. R. 26. Taxations between party and party.

See before Chan. Cons. Ord. XL., r. 32; Morgan, 590.
See *Simmons* v. *Storer*, 14 Ch. D. 154, as to abortive garnishee summonses. As to costs incurred after offer to settle, *Fritz* v. *Hobson*, 14 Ch. D. 542; *Trotter* v. *Maclean*, 13 Ch. D. 574.

27. As to any work and labour properly performed and not herein provided for, and in respect of which fees have heretofore been allowed, the same or similar fees are to be allowed for such work and labour as have heretofore been allowed. R. 27. Work and labour not specially provided for.

See note to r. 29, *post*, p. 632.

28. The rules, orders, and practice of any Court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal, relating to costs, and the allowance of the fees of solicitors and attorneys, and the taxation of R. 28. Application of former rules, orders, and practice.

Special allowances.

costs, existing prior to the commencement of the Act, shall, in so far as they are not inconsistent with the Act and the Rules of Court in pursuance thereof, remain in force and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court and the taxation of costs in the High Court of Justice and Court of Appeal.

See *Pringle* v. *Gloag*, 10 Ch. D. 676.

R. 29.
Discretion of taxing officer.

29. As to all fees or allowances which are discretionary, the same are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who, in the exercise of such discretion, is to take into consideration the other fees and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances.

A direction to tax does not prevent the taxing master from disallowing all costs if in his opinion none are due: *Simmons* v. *Storer*, 14 Ch. D. 154.

As to retainers and refreshers in Admiralty cases, see *The Neera*, 5 P. D. 118. As to refreshers in cases in the Chancery and Common Law Divisions, see *Harrison* v. *Wearing*, 11 Ch. D. 206. M.R. As to costs of third counsel, *Mason* v. *Brentini*, 42 L. T. 726; *Kirkwood* v. *Webster*, 9 Ch. D. 239; *Wigman* v. *Corcoran*, 41 L. T. 792. As to shorthand notes, *ibid.*; *Thorley's Cattle Food Co.* v. *Massam*, 41 L. T. 543; *Kirkwood* v. *Webster*, 9 Ch. D. 239; *Watson* v. *Great Western Railway*, 6 Q. B. D. 163; *Lea Conservancy Board* v. *Butler*, V. C. M. 12 Ch. D. 383; *Marcus* v. *General Steam Navigation Co.*, 35 L. T. 353 C. A. As to costs of shorthand notes used in the Court of Appeal, see *Hill* v. *Metropolitan Asylums Board*, 49 L. J., Q. B., 668 C. A.; in *Re Duchess of Westminster Silver Lead Ore Co.*, 10 Ch. D. 307 C. A.: *Ashworth* v. *Outram*, 9 Ch. D., 483 C. A. As to costs of shorthand notes at a reference, *Wells* v. *Mitcham Gas Co.*, 4 Ex. D. 1. It is not competent to a registrar on taxation to enter into the question of disallowance of costs by reason of negligence of the solicitor: the "*Papa de Rossio*," 3 P. D. 160; as to mortgagees' costs, see *Wade* v. *Thomas*, 17 Ch. D. 348 M.R.; as to apportionment of costs, see *Sparrow* v. *Hill*, Q. B. D. 362, 44 L. T. 146; as to the costs of a country solicitor attending appeal, see *In re Foster*, 8 Ch. D. 598.

R. 30.
Objection to taxation.

30. Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any item or items, may, at any time before the certificate or allocatur is signed, deliver to the other party interested

therein, and carry in before the taxing officer, an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the item or items, or parts or part thereof, objected to, and may thereupon apply to the taxing officer to review the taxation in respect of the same. Special allowances.

This is taken from Chan. Cons. Ord. XL., r. 33; Morgan. 592. Only the items objected to must be stated. No reasons need be specified. *Simmons* v. *Storer*, 14 Ch. D. 154.

The costs between solicitor and client in an administration action in the County Court may be taxed in the High Court: *Re Worth*, 18 Ch. D. 521.

31. Upon such application the taxing officer shall reconsider and review his taxation upon such objections, and he may, if he shall think fit, receive further evidence in respect thereof, and, if so required by either party, he shall state either in his certificate of taxation or allocatur, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto. R. 31. Review of taxation by taxing officer.

This is taken from the same Ord., r. 34; Morgan, 416.

32. Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to as aforesaid, may apply to a judge at chambers for an order to review the taxation as to the same item or part of an item, and the judge may thereupon make such order as to the judge may seem just; but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid. R. 32. Review of taxation by judge.

This is founded on Chan. Gen. Ord., 17 April, 1867, r. 3; Morgan, 648. Unless the taxing officer has decided on a wrong principle, the judge will not ordinarily interfere with his discretion. *The Veera*, 5 P. D. 118; *Hargreaves* v. *Scott*, 4 C. P. D., 21. See r. 29 *supra*.

33. Such application shall be heard and determined by the judge upon the evidence which shall have been brought in before the taxing officer, and no further evidence shall be received upon the hearing thereof, unless the judge shall otherwise direct. R. 33. Evidence thereon.

This is taken from the same Gen. Ord., r. 4.

34. When a writ of summons for the commencement of an action shall be issued from a district, and when an action proceeds in a district registry, all fees and allow- R. 34. Costs in District Registries.

Special allowances.

ances, and rules and directions relating to costs, which would be applicable to such proceeding if the writ of summons were issued in London, and if the action proceeded in London, shall apply to such writ of summons issued from and other proceedings in the district registry.

See *The Neera*, 5 P. D., 118.

R. 1—3. taken in money, and applied and accounted for in such manner as the Treasury may from time to time direct.

See, as to District Registries of Liverpool and Manchester, Order dated 24th Oct., 1876, *post*, p. 536.

II.

R. 2. Lower scale. The fees and percentages set forth in the column headed Lower Scale in the Schedule hereto are to be taken and paid in all cases in which the lower scale of fees is to be charged and allowed to solicitors under the provisions of the Additional Rules of Court under the Supreme Court of Judicature Act, 1875, issued by Order in Council, dated the 12th day of August, 1875, and the fees and percentages set forth in the column headed Higher Scale in the Schedule hereto are to be taken and paid in all other cases.

Higher scale.

See R. S. C. (Costs), *ante*, p. 607.

III.

R. 3. Certificate of lower scale in the Chancery Division. In causes and matters by the 34th Section of the Supreme Court of Judicature Act, 1873, assigned to the Chancery Division:

The solicitor or party acting in person shall, on any proceeding in which he claims to pay fees according to the Lower Scale, file with the proper officer a certificate in the form hereunder set forth, of which certificate the officer is, at the request of any solicitor or any party acting in person in the cause or matter, to mark a copy without a fee.

On production of such copy of the certificate all officers of the Court are to receive and file all proceedings in the cause or matter bearing stamps according to the Lower Scale.

In any case certified for the Lower Scale of Court fees, in which it shall happen that the solicitor shall become entitled to charge and be allowed according to the Higher Scale of solicitors' fees, the deficiency in the fees of Court is to be made good.

In any case in which the fees have been paid upon the Higher Scale, and in which it shall happen that the solicitor shall become entitled to charge and be allowed only according to the Lower Scale of solicitors' fees, the excess of fees so paid may be allowed upon the taxation of costs,

if the circumstances of the case shall, in the judgment of the taxing officer, justify such allowance. Rr. 3, 4.

See Act of 1873, s. 34, *ante*, p. 47. This rule is taken from Regulation III. subjoined to Chan. Cons. Ord.; Morgan's Acts and Orders, Appx. p. xxxv., ed. 4; Forms to Dan. Ch. Pr. 1547, ed. 2.

IV.

The provisions in this Order shall not apply to or affect any of the matters following (that is to say) :— R. 4. Exceptions.

The existing fees and percentages in respect of any of the jurisdictions which are not, by the Supreme Court of Judicature Acts, 1873 and 1875, transferred to the High Court of Justice or the Court of Appeal;

The existing fees and percentages in respect of any matter at the time of the passing of the Supreme Court of Judicature Act, 1875, within the jurisdiction of the Court of Probate, the Court for Divorce and Matrimonial Causes, or the Admiralty Court, or relating to any appeal from the Chief Judge in Bankruptcy, except so far as the procedure in any such matter or the fees or percentages to be taken in respect thereof, is or are expressly varied by the schedule to the said Act, or by this Order, or by any Rules of Court made or to be made by Order in Council before the commencement of the said Act;

The existing fees and percentages in respect of any criminal proceedings, other than such proceedings on the Crown side of the Queen's Bench Division as the scale contained in the Schedule hereto may be applicable to;

The existing fees and percentages in respect of matters on the Revenue side of the Exchequer Division and proceedings and business in the office of the Queen's Remembrancer other than such matters, proceedings, and business as the scale contained in the Schedule hereto may be applicable to;

The existing fees and percentages authorised to be taken by any sheriffs, under-sheriffs, deputy sheriffs, bailiffs, or other officers or ministers of sheriffs;

The existing fees and percentages directed to be taken or paid by any Act of Parliament, and in respect of which no fee or percentage is hereby provided;

Rr. 4—8.

The existing fees and percentages which shall have become due or payable before the commencement of the Judicature Acts, 1873 and 1875;

The existing fees and percentages in respect of any proceedings in any cause or matter pending at the commencement of the said Acts, and in respect of which no fee or percentage is hereby provided.

V.

R. 5. Proceeding by paupers.

The existing rules and practice, applicable to proceedings by persons suing in formâ pauperis, shall continue and be applicable to proceedings to which this Order relates.

As to proceedings by paupers, see Chan. Cons. Ord. VII., rr. 8—11; *Ibid.*, XL., r. 5; Regul. to *Ibid.*, Sec. III. Reg. 3; Morgan. pp. 403—406, 578, Appx. xxxvi.; Dan. Ch. Pr., p. 37, ed. 5; Forms to *Ibid.*, 1550, ed. 2.

VI.

R. 6. Abolition of fees.

Save as otherwise provided by this Order, all existing fees and percentages which may be taken in any of the Courts whose jurisdiction is, by the Judicature Acts, 1873 and 1875, transferred to the High Court of Justice or Court of Appeal, or in any office which is connected with any of those Courts, or in which any business connected with any of those Courts is conducted, or by any officer paid wholly or partly out of public monies who is attached to any of those Courts, or the Supreme Court, or any Judge of those Courts, or any of them, shall be and are hereby abolished.

VII.

R. 7. Length of folio.

A folio is to comprise 72 words, every figure comprised in a column being counted as one word.

And see R. S. C. (Costs), Special Allowances, r. 12, *ante*, p. 627.

VIII.

R. 8. Interpretation of terms.

The provisions of Order LXIII. in the first Schedule to the Supreme Court of Judicature Act, 1875, shall apply to this Order.

See R. S. C., O. LXIII., *ante*, p. 444.

IX.

R. 9.

This Order shall come into operation at the time of the commencement of the Supreme Court of Judicature Acts, 1873 and 1875.

R. 9. Commencement of Order.

See note to s. 2, Act of 1873, *ante*, p. 2.

Form of Certificate for paying Lower Scale of Court Fees above referred to.

Lower scale certificate.

(Title of Cause or Matter.)

I hereby certify that to the best of my judgment and belief the Lower Scale of Fees of Court is applicable to this case.

Dated, &c.

A. B.,
Solicitor for Plaintiff, *or* Defendant.

THE SCHEDULE ABOVE REFERRED TO (*a*).

Schedule.

An Order or Rule herein referred to by number shall mean the Order or Rule so numbered in the First Schedule to the Supreme Court of Judicature Act, 1875.

Summonses, Writs, Commissions, and Warrants. [See *post*, p. 655.]

Summons, &c.

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
On sealing a writ of summons for commencement of an action -	0	5	0	0	10	0
On sealing a concurrent, renewed or amended writ of summons for commencement of an action	0	2	6	0	2	6
On sealing a notice for service under Order XVI., Rule 18 -	0	2	6	0	2	6
On sealing a writ of mandamus or injunction - - - -	0	10	0	1	0	0
On sealing a writ of subpœna not exceeding three persons -	0	2	6	0	5	0
On sealing every other writ -	0	5	0	0	10	0

(*a*) See Order of 22nd April, 1876, *post*, p. 653, as to the mode of taking the fees in this Schedule by stamps.

Schedule.		Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
	On sealing a summons to originate proceedings in the Chancery Division - - - - -	0	5	0	0	10	0
	On sealing a duplicate thereof -	0	1	0	0	5	0
	On sealing a copy of same for service - - - - - -	0	1	0	0	5	0
	On sealing or issuing any other summons or warrant - -	0	2	0	0	3	0
	On sealing or issuing a commission to take oaths or affidavits in the Supreme Court - -	5	0	0	5	0	0
	Every other commission - -	1	0	0	1	0	0
	On marking a copy of a petition of right for service - -	0	1	0	0	5	0
Appearances.	APPEARANCES. [See *post*, p. 657.]						
	On entering an appearance, for each person - - - - -	0	2	0	0	2	0
Copies.	COPIES. [See *post*, p. 657.]						
	For a copy of a written deposition of a witness to enable a party to print the same, for each folio - - - - -	0	0	4	0	0	
	For examining a written or printed copy, and marking same as an office copy, for each folio - - - - - -	0	0	2	0	0	2
	For making a copy and marking same as an office copy, for each folio - - - - - -	0	0	6	0	0	6
	For a copy in a foreign language, the actual cost.						
	For a copy of a plan, map, section, drawing, photograph, or diagram, the actual cost.						
	For a printed copy of an order not being an office or certified copy, for each folio - -	0	0	1	0	0	1

ATTENDANCES. [See *post*, p. 657.] Schedule.

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.	Attendances.
On an application, with or without a subpœna, for any officer to attend as a witness, or to produce any record or document to be given in evidence (in addition to the reasonable expenses of the officer) for each day or part of a day he shall necessarily be absent from his office - - - - - -	1	0	0	1	0	0	
The officer may require a deposit of stamps on account of any further fees, and a deposit of money on account of any further expenses which may probably become payable beyond the amount paid for fees and expenses on the application, and the officer or his clerk taking such deposit shall thereupon make a memorandum thereof on the application.							
The officer may also require an undertaking in writing to pay any further fees and expenses which may become payable beyond the amounts so paid and deposited.							

OATHS, &c. [See *post*, p. 658.] Oaths, &c.

For taking an affidavit or an affirmation or attestation upon honour in lieu of an affidavit or a declaration, except for the purpose of receipt of dividends from the Paymaster-General, for each person making the same - - - - - -	0	1	6	0	1	6
And in addition thereto for each exhibit therein referred to and required to be marked, whether annexed or not - - - -	0	1	0	0	1	0

Schedule.

Filing.

FILING. [See *post*, p. 658.]

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
On filing a special case or petition of right - - -	0	10	0	1	0	0
On filing an affidavit with exhibits (if any) annexed, submission to arbitration, award, bill of sale, warrant of attorney, cognovit, bail, satisfaction piece, and writ of execution with return - - - - - -	0	2	0	0	2	0
On filing a scheme pursuant to the Statute 30 & 31 Vict. c. 127, or the Liquidation Act, 1868 - - - - - -	1	0	0	1	0	0
On filing a caveat - - -	0	5	0	0	5	

Certificates.

CERTIFICATES. [See *post*, p. 659.]

For a certificate of appearance, or of a pleading, affidavit, or proceeding having been entered, filed, or taken, or of the negative thereof - - -	0	1	0	0	4	

Searches and inspections.

SEARCHES AND INSPECTIONS. [See *post*, p. 659.]

On an application to search for an appearance or an affidavit, and inspecting the same - -	0	1	0	0	1	0
On an application to search an index, and inspect a pleading, decree, order, or other record, unless otherwise expressly provided for by any Act of Parliament or this Order, and to inspect documents deposited for safe custody or production pursuant to an order, for each hour or part of an hour occupied - - - - -	0	2	6	0	2	6
Not exceeding on one day - -	0	10	0	0	10	0

By the Order as to Court Fees of 6 August, 1880— Schedule.

1. The schedule to the Order as to Court Fees made on the 28th of October, 1875, shall have effect as if there were inserted therein the following Fees, namely :—

SEARCHES AND INSPECTIONS.

	Lower Scale. £ s. d.	Higher Scale. £ s. d.
For an official certificate of the result of a search in one name in any register or index under the custody of the Clerk of Inrolments, the Registrar of Bills of Sale, the Registrar of Certificates of Acknowledgments of Deeds by Married Women, or the Registrar of Judgments -	0 5 0	0 5 0
For every additional name if included in same certificate -	0 2 0	0 2 0
For a duplicate copy of certificate, if not more than three folios -	0 1 0	0 1 0
For every additional folio - -	0 0 6	0 0 6
For a continuation search if made within 14 days of date of official certificate (the result to be indorsed on such certificate) - - - - - -	0 1 0	0 1 0

NOTICES. Notices.

For a notice as to stock under Order 46, r. 4 (Rule 23 of the Rules of the Supreme Court, April, 1880) - - -	0 10 0	0 10 0

2. This Order shall come into operation on the 1st day of September, 1880.

SELBORNE, C.
G. JESSEL, M.R.
W. M. JAMES, L.J.
HENRY COTTON, L.J.

We certify that this Order is made with the concurrence of the Commissioners of Her Majesty's Treasury.

JOHN HOLMS.
ARTHUR D. HAYTER.

Schedule. EXAMINATION OF WITNESSES. [See *post*, p. 659.]

Examination of witnesses.	Lower Scale. £ s. d.	Higher Scale. £ s. d.
For every witness sworn and examined by an examiner or other officer in his office, including oath, for each hour -	0 10 0	0 10 0
For an examination of witnesses by any such officer away from the office (in addition to reasonable travelling and other expenses), per day - - -	3 0 0	3 0 0
The officer may require a deposit of stamps on account of fees and a deposit of money on account of expenses, which may probably become payable beyond any amount paid for fees and expenses upon the examination, and the officer or his clerk taking such deposit shall thereupon make a memorandum thereof and deliver the same to the party making the deposit.		
The officer may also require an undertaking, in writing, to pay any further fees and expenses which may become payable beyond the amount so paid and deposited.		
These fees are not to apply to the examination of witnesses for the purpose of any inquiry, taxation of costs, or other proceeding before the officer.		

Hearing. HEARING. [See *post*, p. 660.]

For entering or setting down, or re-entering or re-setting down an appeal to the Court of Appeal, or a cause for trial or hearing in any Court in London or Middlesex, or at any Assizes, including a demurrer, special case, and petition of		

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.	Schedule.
right, but not any other petition, nor a summons adjourned from Chambers - - -	1	0	0	2	0	0	
For a certificate of an Associate of the result of trial - -	1	0	0	1	0	0	
JUDGMENTS, DECREES, AND ORDERS. [See *post*, pp. 660—667].							Judgments, &c.
For drawing up and entering a judgment, or a decree or decretal order, whether on the original hearing of a cause or on further consideration, including a cause commenced by summons at Chambers, and an order on the hearing of a special case or petition, and any order by the Court of Appeal - -	0	10	0	1	0	0	
For drawing up and entering any other Order, whether made in Court or at Chambers - -	0	3	0	0	5	0	
For copy of a plan, map, section, drawing, photograph, or diagram, required to accompany any order, the actual cost.							
TAKING ACCOUNTS. [See *post*, p. 661.]							Taking accounts.
On taking an account of a receiver, guardian, consignee, bailee, manager, provisional, official, or voluntary liquidator, or sequestrator, or of an executor, administrator, trustee, agent, solicitor, mortgagee, co-tenant, co-partner, execution creditor, or other person liable to account, when the amount found to have been received without deducting any payment shall not exceed £200 - -	0	2	0	0	2	0	

Schedule.	Lower Scale. £ s. d.	Higher Scale. £ s. d.
Where such amount shall exceed £200, for every £50, or fraction of £50 - - - - -	0 0 6	0 0 6
In the case of any such receiver, guardian, consignee, bailee, manager, liquidator, sequestrator, or execution creditor, the fees shall, upon payment, be allowed in the account unless the Court or Judge shall otherwise direct, and in the case of taking the accounts of such other accounting parties the fees shall be paid by the party having the conduct of the order under which such account is taken as part of his costs of the cause or matter (unless the Court or Judge shall otherwise direct), and in such case shall be taken upon the certificate of the result of any such account; but the fees shall be due and payable, although no certificate is required, on the account taken, or on such part thereof as may be taken, and the solicitor or party suing in person shall in such case cause the proper stamps (the amount thereof to be fixed by the officer) to be impressed on or affixed to the account.		
The officer taking the account may require a deposit of stamps on account of fees before taking the account, not exceeding the fees on the full amount appearing by the account to have been received, and the officer or his clerk taking such deposit shall make a memorandum thereof on the account.		

TAXATION OF COSTS. [See *post*, p. 661.] Schedule.

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.	Taxation of costs.
For taxing a bill of costs where the amount allowed does not exceed £8 - - - - -	0	2	0	0	4	0	
Where the amount exceeds £8, for every £2 allowed or a fraction thereof - - -	0	0	6	0	1	0	
These fees, except where otherwise provided, shall be taken on signing the certificate or on the allowance of the bill of costs, as taxed, but the fees shall be due and payable if no certificate or allocatur is required on the amount of the bill as taxed, or on the amount of such part thereof as may be taxed, and the solicitor or party suing in person shall in such case cause the proper stamps (the amount thereof to be fixed by the officer) to be impressed on or affixed to the bill of costs.							
The taxing officer may require a deposit of stamps on account of fees before taxation not exceeding the fees on the full amount of the costs as submitted for taxation, and the officer or his clerk on taking such deposit shall make a memorandum thereof on the bill of costs.							
For a certificate or allocatur of the result, not being a judgment -	0	0	0	1	0	0	
The 58th Rule of Order V. of the Chancery Funds Consolidated Rules, 1874 (*a*), shall continue in force and be acted upon in cases to which it is applicable.							

(*a*) See W. N. 1875, Pt. II., p. 17.

Schedule.

PETITIONS. [See *post*, pp. 662—667.]

Petitions.

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
For answering a petition for hearing in court, and setting down	0	5	0	1	0	0

ORDER AS TO COURT FEES—OCT. 1875.

For answering a non-attendable petition, not being a petition for an order of course - -	0	5	0	0	10	0
On a matter of course order, on a petition of right - - -	0	10	0	0	10	0
On an order for a commission on a petition of right - - -	1	0	0	1	0	0

Register of judgments, &c.

REGISTER OF JUDGMENTS AND LIS PENDENS. [See *post*, p. 662.]

For registering a judgment or lis pendens, although more than one name may have to be registered - - - - - -	0	2	6	0	2	6
For re-registering same - -	0	1	0	0	1	0
For a search, for each name -	0	1	0	0	1	0
For a certificate of entry of satisfaction - - - - -	0	1	0	0	1	0
For certificate of a judgment for registration in Ireland or Scotland under the Judgments Extension Act, 1868, including affidavit - - - - -	0	2	0	0	2	0
On filing for registration a certificate issued out of Courts of Dublin or Court of Session in Scotland under the same Act, although more than one name may have to be registered under the same Act - - - -	0	7	0	0	7	0
On every certificate of the entry of a satisfaction under the same Act - - - - - -	0	1	0	0	1	0
For a search made in one or both of the Registers of Irish and Scotch judgments, for each name - - - - - -	0	1	0	0	1	0

MISCELLANEOUS. [See *post*, pp

	Lower £	s
On a report of a Private Bill in Parliament - - - - -	5	(
On an allowance of bye-laws or table of fees - - - - -	1	(
On a fiat of a judge - - -	0	1
On signing an advertisement -	0	0
Upon a reference to a master of the Queen's Bench, Common Pleas, or Exchequer Divisions, or a District Registrar, for the purpose of any investigation or inquiry, other than the taking of an account for which another fee is herein provided, for every hour or part of an hour the Master or Registrar is occupied	0	10
A deposit on account of fees before proceeding with such reference, or at any time during the course thereof, may be required, and a memorandum thereof shall be delivered to the party making the deposit.		
On taking acknowledgment of a deed by a married woman -	1	0
On taking a recognizance or bond	0	10
On taking bail, and taking same off the file and delivering -	0	2
On a commitment - - - -	0	5
On an application to produce judge's notes - - - -	0	5
On appointment of commissioners under glebe exchange - -	1	0
On examining and signing inrolments of decrees and orders -	3	0
On admission or re-admission of a solicitor - - - - -	5	0
On a written request for information at the Chancery Pay Office	0	2

Schedule.	Higher Scale. £	s.	d.	Lower Scale. £	s.	d.
For preparing a power of attorney at the Chancery Pay Office -	0	3	0	0	3	0
For transcript of an account in the books at the Chancery Pay Office, for each opening - -	0	2	0	0	2	0

CAIRNS, *C.*
G. JESSEL.
COLERIDGE.
FITZROY KELLY.
W. M. JAMES.
GEORGE MELLISH.
G. BRAMWELL.
NATHANL. LINDLEY.

We certify that this Order is made with the concurrence of the Commissioners of Her Majesty's Treasury.

MAHON.
ROW. WINN.

28*th October*, 1875.

ORDERS AS TO TAKING FEES BY STAMPS.

I. ORDER DATED 28TH OCTOBER, 1875 (*a*).

ORDER AS TO THE TAKING OF THE FEES AND PERCENTAGES IN THE SUPREME COURT OF JUDICATURE BY STAMPS, EXCEPT IN THE DISTRICT REGISTRIES.

THE 28TH DAY OF OCTOBER, 1875.

WHEREAS, by Section 26 of the Supreme Court of Judicature Act, 1875, it is provided that the fees and percentages appointed to be taken in the High Court of Justice and in the Court of Appeal, and in any Court to be created by any Commission, and in any office which is connected with any of those Courts or in which any business connected with any of those Courts is conducted, shall, except so far as they be otherwise directed, be taken by means of stamps; and further, that such stamps shall be impressed or adhesive, as the Treasury may from time to time direct; and that the Treasury, with the concurrence of the Lord Chancellor, may from time to time make such rules as may seem fit for publishing the amount of the fees and regulating the use of such stamps, and particularly for prescribing the application thereof to documents from time to time in use or required to be used for the purposes of such stamps, and for ensuring the proper cancellation of such stamps.

See Act of 1875, s. 26, *ante*, p. 34, and note thereto.

Now we, the undersigned, being two of the Lords Commissioners of Her Majesty's Treasury, do, with the concurrence of the Lord Chancellor, hereby give notice and order and direct—

R. 1. Existing regulations to remain in force temporarily.

1. That from and after the 1st November next, being the date fixed for the commencement of this Act, all orders and regulations now in force with respect to the use, proper cancellation, mode of keeping accounts, and allowance of fee stamps in

(*a*) See W. N. 1875, Pt. II., p. 460. The Order, as issued, is without marginal notes. See also Order of 22nd April, 1876, *post*, p. 653.

Rr. 1—5.

The Court of Chancery,
„ several Common Law Courts,
„ Court of Probate,
„ Court for Divorce and Matrimonial Causes,
„ Admiralty Court,

or in relation to appeals from the Chief Judge in Bankruptcy, or from the Court of Appeal in Chancery in Bankruptcy matters, shall continue in force up to the beginning of the sittings to take place after January next, or until they shall respectively be altered or annulled by any rules hereafter to be made and published in conformity with the Act.

R. 2. Impressed or adhesive stamps.

2. That the stamps to be used in the collection of fees and percentages payable under the Order made in pursuance of the powers given by the Supreme Court of Judicature Act, 1875, bearing date this day, shall until further notice, be either impressed or adhesive as directed in any previous Order; and in cases to which no previous Order is applicable, shall be either impressed or adhesive, at the option of the parties by whom the fees are payable.

See Order of Oct., 1875, as to Court fees, *ante*, p. 506.

R. 3. Use of existing dies and stamps.

3. That until we do order to the contrary, the dies heretofore in use for impressing stamps in any of the Courts affected by the said Act, and also the adhesive stamps heretofore in use, shall be available and valid for the taking of the said fees and percentages, and may be used notwithstanding that new dies and stamps appropriated to the Supreme Court of Judicature may in the meantime have been issued by the Commissioners of Inland Revenue, which will also be valid and available.

R. 4. Use of words "Judicature Fees."

4. That for such documents in the Chancery, the Queen's Bench, the Common Pleas, and the Exchequer Divisions of the Supreme Court of Judicature as may be under any existing Rule or Order, stamped with an adhesive stamp or stamps, adhesive stamps appropriated by the words "Judicature Fees" shall be used; Provided always that up to the beginning of the sittings to take place after January next, the adhesive stamps hitherto used in the Courts of Chancery and Common Law shall be available and may be used for such documents in the Supreme Court of Judicature.

R. 5. Stamping præcipe or note.

5. And that where any of such fees are payable in respect of any matter or thing to be done by any officer or in any office whatever of the Supreme Court of Judica-

Rr. 1—3. make such rules as may seem fit for publishing the amount of the fees and regulating the use of such stamps, and particularly for prescribing the application thereof to documents from time to time in use or required to be used for the purposes of such stamps, and for ensuring the proper cancellation of such stamps and for keeping accounts of such stamps.

See Act of 1875, s. 26, *ante*, p. 116.

And whereas by an Order made under the same section of the said Act, on the 28th day of October, 1875, it was (amongst other things) provided that the stamps to be used in the collection of the fees and percentages therein mentioned should, until further notice, be either impressed or adhesive as directed in any previous Order, and in cases to which no previous Order was applicable, should be either impressed or adhesive, at the option of the parties by whom the fees were payable, and it was also provided that up to the beginning of the sittings on the 25th day of April, 1876, the adhesive stamps used before the publication of the said Order in the Courts of Chancery and Common Law should be available, and might be used, in the Supreme Court of Judicature.

See the Order, *ante*, p. 652. The 25th April, 1876, was the first day of the sittings of the Court after the sittings which commenced in January of that year: see *ante*, pp. 651, 652, rr. 1, 4.

And whereas it is expedient to further extend the use of the same stamps, and to make other provisions in lieu of, and in addition to, those contained in the said Order of the 28th day of October, 1875.

Now, we, the undersigned, being two of the Lords Commissioners of Her Majesty's Treasury, do, with the concurrence of the Lord Chancellor, hereby give notice and order and direct :—

R. 1. Character of stamps to be used. 1. That from and after the 25th day of April, 1876, the stamps used for denoting the said fees and percentages shall be of the character, and be applied and otherwise dealt with, as prescribed by the schedule hereto.

R. 2. Adhesive stamps. 2. That the adhesive stamps at present in use in the Supreme Court of Judicature shall continue to be used so long as they are supplied by the Commissioners of Inland Revenue.

R. 3. Deposits account. 3. That in any case in which a deposit on account of probable fees and expenses is required, the following regulations shall be observed :—

As to Deposits. R. 3.

(*a.*) The party, or his Solicitor, from whom, under any Order as to Court fees a deposit may be required, shall, before the matter or cause be proceeded with, present for the signature of the Officer of the Court requiring the deposit, a certificate, duly stamped, for the amount of such deposit. Forms of certificates provided by the Commissioners of Inland Revenue may be obtained at the Inland Revenue Office, Somerset House, or at such other places as the Commissioners may appoint.

(*b.*) When the fees and expenses are ascertained, the said Officer of the Court shall endorse upon the said certificate the amount thereof.

(*c.*) If the amount is in excess of the deposit, the certificate, bearing an additional stamp equal to the excess, must be produced to the said Officer before he delivers his judgment or award, or gives his decision in the matter or cause.

(*d.*) If the amount of the fees and expenses is less than the deposit, the holder of the certificate may obtain repayment of the difference upon presenting the certificate so endorsed at the Inland Revenue Office, Somerset House.

See as to deposits, Ord. as to Court Fees, Oct. 1875, *ante*, pp. 511 to 514, 516 to 518.

THE SCHEDULE ABOVE REFERRED TO. Schedule.

Summonses, Writs, Commissions, and Warrants. [See *ante*, p. 639.] Summonses, &c

	Document to be Stamped.	Character of Stamp to be Used.	Regulations and Observations.
On sealing a writ of summons for commencement of an action *On sealing a concurrent, renewed or amended writ of summons for commencement of an action (a)*	*Writ of summons*	*Impressed or adhesive*	*Forms of writ with the impressed stamp will be sold at the Inland Revenue Office, and by Law Stationers*

(*a*) The rules as to summonses, &c., printed in italics, are superseded by the Order 12 July, 1881, see *post*, p. 665.

Schedule.

	Document to be Stamped.	Character of Stamp to be Used.	Regulations and Observations.
On sealing a notice for service under Order XVI., rule 18 [*ante*, p. 184].	Notice ...	Impressed or adhesive	Forms with the impressed stamp will be sold at the Inland Revenue Office, and by Law Stationers
On sealing a writ of mandamus or injunction On sealing a writ of subpœna not exceeding three persons On sealing every other writ	Præcipe left at time of issuing writ	Impressed	Præcipes with the impressed stamp will be sold at the Inland Revenue Office, and by Law Stationers
On sealing a summons to originate proceedings in the Chancery Division	Summons	Impressed	A form of summons will be sold at the Inland Revenue Office, and by Law Stationers
On sealing a Duplicate thereof	Duplicate summons	Impressed	
On sealing a copy of same for service ..	Copy of summons	Impressed or adhesive	
On sealing or issuing any other summons or warrant .	Summons	Impressed or adhesive	
On sealing or issuing a commission to take oaths or affidavits in the Supreme Court	Commission	Impressed	Forms of commission with the impressed stamp will be sold at the Inland Revenue Office
Every other commission	Commission	Impressed	The commission or the copy of petition to be written on impressed paper, or the document to be produced at the Inland Revenue Office to be stamped
On marking a copy of a petition of right for service ..	Copy of petition	Impressed	

APPEARANCES. [See *ante*, p. 640.]

Appearances.

The fee payable on entering an appearance to be denoted by an impressed stamp on the form of memorandum as prescribed by the Appendix to the Supreme Court of Judicature Act, 1875, *and where the appearance of more than one person is entered by the same memorandum, the fees for all persons beyond the first to be denoted by means of impressed or adhesive stamps.*

Forms of memorandum of appearance with the impressed stamp for one or more defendants will be sold at the Inland Revenue Office, and by Law Stationers (*a*).

COPIES. [See *ante*, p. 640.]

Copies.

	Document to be Stamped.	Character of Stamp to be Used.
For a copy of a written deposition of a witness to enable a party to print the same	Copy .	Impressed or adhesive
For examining a written or printed copy, and marking same as an office copy	Copy .	Impressed or adhesive
For making a copy and marking same as an office copy	Copy .	Impressed or adhesive
For a copy in a foreign language...	Copy .	Impressed or adhesive
For a copy of a plan, map, section, drawing, photograph, or diagram	Præcipe or copy	Impressed or adhesive
For a printed copy of an order, not being an office or certified copy	Copy .	Impressed or adhesive

ATTENDANCES. [See *ante*, p. 641.]

Attendances.

The fees payable under this heading to be denoted either by an impressed or adhesive stamp on the subpœna, notice, or other document requiring the attendance of the officer.

If the officer's attendance be required beyond one day, the additional fee per diem after the first to be taken by means of a præcipe with the impressed stamp, filed in the department from which the officer is summoned.

(*a*) This rule is superseded by the Order of 12 July 1881, *post* p. 665.

Schedule.

OATHS, &c. [See *ante*, p. 641.]

Oaths, &c.

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For taking an affidavit or an affirmation or attestation upon honour in lieu of an affidavit or a declaration, except for the purpose of receipt of dividends from the Paymaster-General, on which no fee is payable.	Affidavit or other document answering thereto	Impressed or adhesive	

	Document to be Stamped and character of Stamp to be Used.	Regulations and Observations.
And in addition thereto, for each exhibit therein referred to and required to be marked	Stamp to be impressed or adhesive on exhibit if practicable, but if not, to be impressed on præcipe filed	

Filing.

FILING. [See *ante*, p. 642.]

	Document to be Stamped.	Character of Stamp to be Used.	Regulations and Observations.
On filing a special case or petition of right	Special case, petition of right or præcipe	Impressed	Where practicable, stamp to be on special case or petition of right, and in other cases on præcipe filed
On filing an affidavit with exhibits (if any) annexed, submission to arbitration, award, bill of sale, war-	Document filed	Impressed or adhesive	

Schedule.

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
rant of attorney, cognovit, bail, satisfaction piece, and writ of execution with return			
On filing a scheme pursuant to the statute 30 & 31 Vict. c. 127, or the Liquidation Act, 1868	Scheme .	Impressed	
On filing a caveat	Caveat .	Impressed	

CERTIFICATES. [See *ante*, p. 642.]

Certificates.

	Document to be Stamped.	Character of Stamp to be Used.	Regulations and Observations.
For a certificate of appearance or of a pleading, affidavit or proceeding having been entered, filed, or taken, or of the negative thereof	Certificate	Impressed or adhesive	Forms of certificate with the impressed stamp will be sold at the Inland Revenue Office, and by Law Stationers

SEARCHES AND INSPECTIONS. [See *ante*, p. 642.]

Searches and inspections.

The fees on searches and inspections to be taken by means of impressed stamps on a form which will be issued at the Inland Revenue Office and sold there, and by Law Stationers.

EXAMINATION OF WITNESSES. [See *ante*, p. 644.]

Examination of witnesses.

The fees under this heading may still be denoted by means of adhesive stamps, which may be affixed either to the deposition or to the order or application paper for examination.

Schedule.

HEARING. [See *ante*, p. 644.]

Hearing.

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For entering or setting down, or re-entering or re-setting down, an appeal to the Court of Appeal, or a cause for trial or hearing in any Court in London or Middlesex, or at any Assizes, including a demurrer, special case, and petition of right, but not any other petition, nor a summons adjourned from Chambers	In the Registry Office, Chancery Division, on forms provided for the purpose	Impressed	Forms, with the impressed stamp, will be sold at the Inland Revenue Office, and at the Registrar's Office, Chancery Division
	At offices of Associates, on copy of pleadings	Impressed or adhesive	
	At all other offices of the High Court or Court of Appeal, on præcipe	Impressed	
For certificate of an Associate of the result of trial	Certificate	Impressed or adhesive	

Judgments, decrees, and orders.

JUDGMENTS, DECREES, AND ORDERS. [See *ante*, p. 645.]

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For drawing up and entering a judgment, or decree or decretal order, whether on the original hearing of a cause or on further consideration, including a cause commenced by summons at Chambers, and an order on the hearing of a special case or petition, and any order by the Court of Appeal	*Judgment or order*	*Stamp to be impressed or adhesive on the judgment or order, except at the Crown Office, where, as far as practicable, a præcipe with the impressed stamp should be used*	

Schedule.

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For drawing up and entering any other order, whether made in Court or at Chambers	Order . .	Impressed or adhesive	
For copy of a plan, map, section, drawing, photograph, or diagram required to accompany any order	Copy . .	Impressed or adhesive	Where an adhesive stamp would damage the copy, a præcipe, with the impressed stamp, should be used

The rules printed in italics are superseded by the Order of 12 July, 1881.

TAKING ACCOUNTS. [See *ante*, p. 645.]

Taking accounts.

The fees payable under this heading when taken on the accounts to be denoted by means of adhesive stamps affixed to the accounts or by impressed stamps on paper to be left at the office, but when taken on a certificate they may be denoted either by impressed or adhesive stamps.

TAXATION OF COSTS. [See *ante*, p. 647.]

Taxation of costs.

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For taxing a bill of costs	Stamp to be adhesive on bill of costs but where a certificate, allocatur, or præcipe is used, the fee to be denoted by impressed stamps.		
For a certificate or allocatur of the result, not being a judgment	Certificate or allocatur	Impressed	

Schedule.

PETITIONS. [See *ante*, p. 648.]

Petitions.

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For answering a petition for hearing in Court, and setting down	*Petition* .	*Impressed or adhesive*	
For answering a non-attendable petition, not being a petition for an order of course	*Petition* .	*Impressed or adhesive*	
On a matter of course order, on a petition of right	*Order* . .	*Impressed or adhesive*	
On an order for a commission on a petition of right	*Order* . .	*Impressed*	

The rules printed in italics are superseded by the Order of 12 July, 1881, *post*, p. 66.

Register of judgments and lis pendens.

REGISTER OF JUDGMENTS AND LIS PENDENS. [See *ante*, p. 648.]

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For registering a judgment or lis pendens	Memorandum of Registry	Impressed	Form with the impressed stamp will be sold at the Office of the Registrar of Judgments, Common Pleas Division
For re-registering same			
For a search	General form of search præcipe		
For a certificate of entry of satisfaction	Certificate		
For a certificate of a judgment for registration in Ireland or Scotland under the Judgments Extension Act, 1868, including affidavit	Certificate	Impressed or adhesive	

Schedule.

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On filing for registration a certificate issued out of Courts of Dublin or Court of Session in Scotland under the same Act On every certificate of the entry of a satisfaction under the same Act	Certificate	Impressed or adhesive.	
For a search made in one or both of the Registers of Irish and Scotch judgments	Præcipe .	Impressed	Forms of Præcipe, with the impressed stamp, will be sold at the Inland Revenue Office, and by Law Stationers

MISCELLANEOUS. [See *ante*, p. 649.]

Miscellaneous.

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On a report of a Private Bill in Parliament	Report. .	Impressed	
On an allowance of bye-laws or table of fees	Allowance .	Impressed	
* *On a fiat of a Judge*	*Fiat . .*	*Impressed or adhesive*	
On signing an advertisement	Advertisement .	Impressed	
* *Upon a reference to a Master of the Queen's Bench, Common Pleas, or Exchequer Divisions, for the purpose of any investigation or inquiry other than the taking*	*Certificate or other document used in giving the decision*	*Impressed or adhesive*	

* See Order of 12 July, 1881, *post*, p. 665, superseding the rules printed in italics.

Schedule.

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
of an account for which another fee is herein provided			
On taking acknowledgment of a deed by a married woman	Acknowledgment	Impressed	Forms with the impressed stamp will be sold at the Inland Revenue Office
**On taking a recognizance or bond*	*Recognizance*	*Impressed or adhesive*	
**On taking bail, and taking same off the file and delivering*	*Bail piece* .	*Impressed or adhesive*	
**On a commitment*	*Commitment*	*Impressed or adhesive*	
**On an application to produce Judges' notes*	*Application*		
On appointment of Commissioners under glebe exchange	Appointment	Impressed	
On examining and signing inrolment of decrees and orders	Inrolment	Impressed or adhesive	Forms of admission with the impressed stamp will be sold at the Inland Revenue Office
On admission or re-admission of a Solicitor	Admission .	Impressed	
On a written request for information at the Chancery Pay Office	Præcipe .	Impressed	
For preparing a power of attorney at the Chancery Pay Office	Power . .		
**For transcript of an account in the books at the Chancery Pay Office*	*Transcript* .	*Impressed or adhesive*	
Any other proceeding, pleading, or document, not hereinbefore specified	Document or Præcipe	Impressed or adhesive	These are to be impressed if practicable where not filed in the office

* See Order of 12 July, 1881, *post*, p. 665, superseding the rules printed in italics.

GENERAL DIRECTIONS. Schedule.

General directions.

In any case in which the use of impressed stamps is prescribed, paper or parchment on which the document requiring a stamp is to be written may be stamped at the Inland Revenue Office, notwithstanding that stamped forms are also provided by the Commissioners of Inland Revenue.

The cancellation shall be effected in such manner as the Commissioners of Inland Revenue shall from time to time direct.

CRICHTON.
J. D. H. ELPHINSTONE.

I concur in this Order,
CAIRNS, C.

III. ORDER DATED 12 JULY, 1881. (*a*)

12th July, 1881.

AMENDING ORDER AS TO THE FEES AND PERCENTAGES WHICH ARE REQUIRED TO BE TAKEN IN THE SUPREME COURT OF JUDICATURE BY MEANS OF STAMPS.

WHEREAS by Section 26 of the Supreme Court of Judicature Act, 1875, it is provided that the fees and percentages appointed to be taken in the High Court of Justice and in the Court of Appeal, and in any Court to be created by any Commission, and in any office which is connected with any of those Courts, or which any business connected with any of those Courts is conducted in, shall, except so far as they be otherwise directed, be taken by means of stamps; and further that such stamps shall be impressed or adhesive, as the Treasury may from time to time direct; and that the Treasury, with the concurrence of the Lord Chancellor, may from time to time make such rules as may seem fit for publishing the amount of the fees, and regulating the use of such stamps, and particularly for prescribing the application thereof to documents from time to time in use or required to be used for the purposes of such stamps and for ensuring the proper

(*a*) See Weekly Notes, 3 September, 1881.

19th July, 1881.

cancellation of such stamps, and for keeping accounts of such stamps:

And whereas by an Order made under the same section of the said Act on the 22nd April, 1876, it was provided that the stamps to be used in the collection of certain of the fees therein mentioned should be either impressed or adhesive:

And whereas it is expedient to extend the use of impressed stamps and to make the use of them obligatory in the collection of certain fees:

Now, we, the undersigned, being two of the Lords of Her Majesty's Treasury, do with the concurrence of the Lord Chancellor hereby give notice and order and direct:—

1. That from and after the 1st day of August, 1881, the stamps used for denoting the fees as described in the schedule hereto subjoined, shall, in so far as they are payable at the Royal Courts of Justice, be of the character, and be applied and otherwise dealt with as prescribed by such schedule.

Schedule.

THE SCHEDULE ABOVE REFERRED TO.

Summonses and writs.

SUMMONSES AND WRITS.

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On sealing a writ of summons for the commencement of an action	Writ of summons	Impressed only	Forms with the impressed stamp are sold at the Inland Revenue Office, Royal Courts of Justice
On sealing a concurrent, renewed, or amended writ of summons for the commencement of an action	Præcipe	Impressed only	Præcipes with the impressed stamp are sold at the Inland Revenue Office, Royal Courts of Justice

Appearances.

APPEARANCES.

The fee or fees payable on entering an appearance to be denoted by an impressed stamp or stamps on the form of memorandum, as prescribed by the Appendix to the Rules of the Supreme Court, April, 1880.

Forms of memorandum of appearance, with the impressed stamp for one or more defendants, are sold at the Inland Revenue Office, Royal Courts of Justice. Schedule.

JUDGMENTS, DECREES, AND ORDERS.

Judgments, decrees, and orders.

	Documents to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For drawing up and entering a judgment or decree or decretal order, whether on the original hearing of a cause or on further consideration, including a cause commenced by summons at Chambers and an order on the hearing of a special case or petition, and any order by the Court of Appeal	Judgment or order	Stamp to be impressed on the judgment or order except at the Crown Office, where adhesive stamps may for the present be also admitted, but as far as practicable a præcipe, with an impressed stamp, should in all cases be used	

PETITIONS.

Petitions.

	Documents to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For answering a petition for hearing in Court and setting down	Petition . .	Impressed only	
For answering a non-attendable petition not being a petition for an order of course	Petition . .	Impressed only	
On a matter of course order on a petition of right	Order . .	Impressed only	
On an order for a commission on a petition of right	Order . .	Impressed onl	

Schedule.

Miscellaneous.

MISCELLANEOUS.

	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations
On a fiat of a Judge .	Fiat . .	Impressed only	
Upon a reference to a Master of the Supreme Court of Judicature for the purpose of an investigation or inquiry other than the taking of an account for which another fee is provided	Certificate or other document used in giving the decision	Impressed only	
On taking a recognizance or bond	Recognizance .	Impressed only	
On taking bail and taking same off file and delivering	Bail piece .	Impressed only	
On a commitment .	Commitment .	Impressed only	
On an application to produce Judge's notes	Application .	Impressed only	
For transcript of an account in the books at the Chancery Pay Office, for each opening	Transcript .	Impressed only	

We further order that, on and after the 2nd day of November, 1881, it shall, for the due protection of the Revenue, be obligatory on all Court officials charged with the duty of cancelling adhesive stamps, to see that all such stamps, although obliterated by a written or printed cancellation, be afterwards cancelled by means of perforation.

Signature of two of the Lords of the Treasury.

CHARLES C. COTES.
ARTHUR D. HAYTER.

I concur in this Order,
SELBORNE, C.

IV. ORDER DATED 24TH APRIL, 1877 (*a*.)

24th April, 1877.

FEES OF OFFICIAL REFEREES.

THE Right Honourable Hugh MacCalmont Baron Cairns, Lord High Chancellor of Great Britain, with the advice and consent of the undersigned Judges of the Supreme Court, and with the concurrence of the Lords Commissioners of Her Majesty's Treasury, doth hereby, in exercise of the powers for this purpose given by the Supreme Court of Judicature Act, 1875, and of all other powers and authorities enabling him in this behalf, rescind, as to all matters, questions, or issues which shall be referred to an Official Referee from and after the date hereof, the order as to the fees to be taken by the Official Referees made on the 1st day of February, 1876 (*b*), and doth order and direct as follows :—

Fee to be taken.

From and after the date hereof, the fee to be taken by an Official Referee attached to the Supreme Court, in respect of all matters, questions, or issues referred to him by any order, shall be the sum of 5*l*. for the entire reference, irrespective of the time occupied, which sum shall be paid before the reference is proceeded with.

How collected.

Every such fee shall be collected by means of a stamp or stamps to be affixed to the appointment paper or summons issued by the Official Referee for appointing the time and place for proceeding with the reference.

Sittings out of London: Room.

Where the sittings under a reference are to be held elsewhere than in London, a convenient place in which the sittings may be held shall be provided to the satisfaction of the Official Referee, by and at the expense of the party proceeding with the reference ; and there shall be paid, in addition to the above fee of 5*l*., 1*l*. 11*s*. 6*d*. for every night the Official Referee, and 15*s*. for every night the Official Referee's clerk, is absent from London on the business of the reference, together with the reasonable expenses of their travelling from London and back.

Additional fees.

(*a*) The Order, as issued, is without marginal notes.
(*b*) For the Order of 1st Feb. 1876, see W. N. 1876, Pt. II., p. 135.

24th April, 1877.

Deposit.

A deposit on account of expenses may be required before proceeding with the reference, or at any time during the course thereof; and a memorandum of the amount deposited shall be delivered to the party making the deposit.

Party to pay fees.

The fees and expenses and deposit (if any) hereby authorized in respect of any reference shall be paid in the first instance by the party proceeding with the reference.

Accounting.

The Official Referees shall conform to all regulations that may be made from time to time by the Treasury for the accounting for all moneys received by them.

Dated this twenty-fourth day of April, one thousand eight hundred and seventy-seven.

CAIRNS, C.
JNO. MELLOR.
ROBT. LUSH.
HENRY MANISTY.

We certify that this order is made with the concurrence of the Commissioners of Her Majesty's Treasury.

J. D. H. ELPHINSTONE.
ROW. WINN.

V. ORDER DATED 24TH OCTOBER, 1877.

24th Oct. 1877.

FEES TO BE TAKEN IN LIVERPOOL AND MANCHESTER DISTRICT REGISTRIES.

THE HIGH COURT OF JUSTICE, WEDNESDAY, 24TH OCTOBER, 1877.

ORDER BY THE LORD CHANCELLOR AND JUDGES, WITH THE CONSENT OF THE TREASURY, DIRECTING THE FEES IN THE DISTRICT REGISTRIES AT LIVERPOOL AND MANCHESTER (WITH CERTAIN EXCEPTIONS) TO BE TAKEN BY STAMPS.

WHEREAS by an order dated the 28th day of October, 1875, made by the Lord Chancellor in pursuance and exercise of the powers given by the 26th section of the Supreme Court of Judicature Act, 1875, it was ordered that the fees and percentages contained in the schedule to the same order should be taken by stamps, except those taken in the District Registries, which should until further order be taken in money and applied and accounted for as the Treasury might from time to time appoint:

See *ante*, p. 651.

And whereas it is expedient to abolish the said exception so far as relates to the said fees and percentages taken in the District Registries at Liverpool and Manchester respectively, and also to direct that certain fees and percentages hereinafter mentioned should be taken in the same District Registries in money and not by stamps:

Now, therefore, the Right Honourable Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain, by and with the advice and consent of the undersigned Judges of the Supreme Court, and with the concurrence of the Lords Commissioners of Her Majesty's Treasury, doth hereby in pursuance and exercise of the powers given by the above-mentioned Act, and all other powers and authorities enabling him in this behalf, order as follows:—

1. Notwithstanding the hereinbefore recited order or anything therein contained, all the fees and percentages

R. 1. Fees to be taken in stamps.

24th Oct. 1877.

contained in the schedule to that order which are taken in the District Registries at Liverpool and Manchester respectively of the High Court of Justice shall be taken in stamps.

R. 2. Fees on Admiralty sales.

2. All fees and percentages taken in the said District Registries at Liverpool and Manchester respectively, which are chargeable upon and paid out of the proceeds of the sale of property sold pursuant to any order of the Admiralty Division of the High Court of Justice, shall until further order be taken in money, and be applied and accounted for as the Treasury may from time to time direct.

R. 3. Commencement of order.

3. This order shall come into operation on the 2nd day of November, 1877.

CAIRNS, C.
G. JESSEL, M.R.
HENRY C. LOPES.
EDW. FRY.

We certify that this order is made with the concurrence of the Lords Commissioners of Her Majesty's Treasury.

CRICHTON.
ROW. WINN.

APPEALS TO THE HOUSE OF LORDS.

PROCEDURE AND PRACTICE.

THE Procedure to be followed in House of Lords Appeals is determined by ss. 4 and 11 of the Appellate Jurisdiction Act, 1876. Those sections run :—

S. 4. Every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before Her Majesty the Queen in her Court of Parliament, in order that the said Court may determine what of right, and according to the law and custom of this realm, ought to be done in the subject-matter of such appeal.

S. 11. After the commencement of this Act error shall not lie to the House of Lords, and an appeal shall not lie from any of the courts from which an appeal to the House of Lords is given by this Act, except in manner provided by this Act, and subject to such conditions as to the value of the subject-matter in dispute, and as to giving security for costs, and as to the time within which the appeal shall be brought, and generally as to all matters of practice and procedure, or otherwise, as may be imposed by orders of the House of Lords.

An application to stay proceedings or execution pending an appeal to the House of Lords must be made to the Court of Appeal and not to the High Court; *The Khedive*, 5 P. D. 1 C. A. As to when a stay will be granted, see *Grant* v. *Banque Franco-Egyptienne*, 3 C. P. D. 202, C. A.; *Wilson* v. *Church*, 12 Ch. D. 454, C. A.; *Polini* v. *Gray*, 12 Ch. D. 438, C. A.

The House of Lords will not admit evidence which was not presented to the Court below; *Banco de Portugal* v. *Waddell*, 5 App. Cas. 161 (H. L.).

As to making a judgment of the House of Lords an order of the High Court, see *British Dynamite Co.* v. *Krebs*, 11 Ch. D. 448. As to varying the details of an order of the House of Lords, see *Yates* v. *University College, London*, 7 L. R. H. L. 438.

As to costs when the judgment or order appealed from is reversed or varied, see *De Vitre* v. *Betts*, 6 L. R. H. L. at p. 323. As to costs when the judgment below is affirmed because the votes of the House are equally divided, see *Pryce* v. *Monmouthshire Ry. Co.*, 4 App. Cas. 197. As to interest on costs, see *Lancashire and Yorkshire Ry.* v. *Gidlow*, L. R. 9 Ex. 35.

Form of Appeal.

FORM OF APPEAL, METHOD OF PROCEDURE, AND STANDING ORDERS.

APPLICABLE TO ALL APPEALS PRESENTED TO THE HOUSE OF LORDS ON AND AFTER THE 1ST DAY OF NOVEMBER, 1876.

1. FORM OF APPEAL.

To the Right Honourable the *Lords Spiritual and Temporal in Parliament assembled* (*a*).

The humble petition and appeal of A.

Your petitioner humbly prays that the matter of the order [*or* orders, *or* judgment, *or* interlocutor] set forth in the schedule hereto (*b*) [*or*, so far as therein stated to be appealed against] may be reviewed before Her Majesty the Queen in Her Court of Parliament, and that the said order [*or* so far as aforesaid] may be reversed, varied, or altered, or that the petitioner may have such other relief (*if specific relief be desired it can be so stated in the prayer*) in the premises as to Her Majesty the Queen, in Her Court of Parliament, may seem meet; and that (*here name the respondents*) may be required to lodge such printed cases as they may be advised, and the circumstances of the cause may require, in answer to this appeal; and that service of such order on the solicitors in the cause of the said respondents may be deemed good service.

(*To be signed by two counsel.*)

(*Here insert schedule.*)

Schedule to petition.

FORM OF SCHEDULE.

"From Her Majesty's Court of Appeal (England).

"In a certain cause [*or* matter] wherein A. was plaintiff and B. was defendant.

(*a*) The form now usually adopted is, "To the Right Honourable the House of Lords."

(*b*) The schedule must set out the title of the parties to the cause or matter, and the decrees, orders, judgments, or interlocutors appealed against; and where the appeal is not against the whole decree, the part appealed against must be defined: Note to official Form. And see Act of 1876, s. 4, *ante*, p. 673.

Form of Appeal.

"The order appealed from is in the words following, viz. (*set forth order complained of in italics*) (*a*). [*or*, The order referred to in the above prayer is in the words following, the portion appealed from being printed in italics (*set forth order, the portion complained of being printed in italics; the portion not complained of being printed in roman type*) (*a*)].

Certificate of counsel.

We humbly conceive this to be a proper case to be heard before your lordships by way of appeal."

(*To be signed by two counsel*)

As to the certificate of counsel, see Standing Order II., *post*, p. 494.

Certificate of service of notice of appeal.

I, clerk to Messrs. , of solicitors for the appellants within-named, hereby certify that on the day of , I served Messrs. , of , solicitors for , the within-named respondents, with a correct copy of the aforegoing appeal, and with a notice that on the day of , or as soon after as conveniently may be, the petition of appeal would be presented to the House of Lords on behalf of the appellant (*b*).

II. DIRECTIONS FOR AGENTS—METHOD OF PROCEDURE.

Method of Procedure.

Printing appeal.

In accordance with the foregoing notice, the appeal printed on parchment (quarto size), in such form as will enable paper copies thereof to be hereafter bound up with the printed cases, is to be lodged in the Parliament office for presentation to the House, and (if the House be then sitting, or, if not, on the next ensuing meeting of the House) an order thereon for service on the respondents,

Presentation.

Order for service.

(*a*) The schedule, as originally issued, omitted the words "in italics," and "the portion not complained of being printed in roman type." As re-issued it included those words. See W. N. 1876, Pt. II., p. 475; W. N. 1877, Pt. II., p. 57.

(*b*) The notice to respondents is to be written on the last page of the appeal. Not less than two clear days' notice to be given of the intention to present an appeal; Note to Official Form.

Method of Procedure.

or their solicitors, ordering the respondents to lodge cases in answer to appeal, will be issued to the appellant's agent, such order, together with an affidavit of due service entered thereon, to be returned to the Parliament office within the period granted to the appellant for lodging his printed case, under Standing Order No. V.

Affidavit for service.

See Standing Orders III. and V., *post*, pp. 494, 495.

Bond and recognizance for costs.

Each appellant, where there are more than one, is required to enter into the recognizance. The appellants are required to submit to the Clerk of the Parliaments within one week after the date of the presentation of the appeal (unless the sum of two hundred pounds, as required by the Standing Order, be paid to the Receiver of Fees to the Parliament office for payment into the fee fund of the House of Lords) (*a*) the names of the sureties who propose entering into the bond; and in the event of a substitute being proposed to enter into the recognizance in lieu of the appellants, the name of such substitute. Two clear days' previous notice of the names so proposed for bond and recognizance) is to be given to the solicitor or agent of the respondents, and at the time of submitting the said names to the Clerk of the Parliaments a certificate from the solicitor or agent of the appellants is to be lodged in the Parliament office, certifying his belief in the sufficiency of the sureties and substitutes so proposed. At the termination of one week from the lodgment of such certificate, the bond and recognizance are to be issued to the solicitor or agent of the appellants for execution before a commissioner appointed to administer oaths in the Supreme Court of Judicature in England, or a commissioner appointed to administer oaths in Chancery in Ireland, or before a justice of the peace in Scotland. The bond and the recognizance (whether entered into by the appellants or by a substitute) to be returned to the Parliament office within one week from the date of the issue thereof to the solicitor or agent of the appellants.

As to the bond and recognizance, see Standing Order IV., *post*, p. 681. For form of certificate of sufficiency of sureties, &c., see Appendix A, *post*, p. 684; and as to giving security for costs, see Act of 1876, s. 11, *ante*, p. 132.

Appearance book.

The solicitors of those respondents who purpose lodging printed cases in answer to the appeal should attend at the

(*a*) All drafts and cheques to be made payable to "House of Lords Fee Fund," and to be crossed, "Bank of England, Western Branch."

Parliament office for the purpose of ascertaining the due execution of the recognizance and bond, and entering their names in the appearance book. (Notice of the meeting of the appeal committee is only sent to the solicitors of respondents who have thus signified their appearance in the cause.) **Method of Procedure.**

In English appeals six weeks time, and in Irish and Scotch appeals eight weeks time, from the date of the presentation of the appeal, is granted to all parties to lodge printed cases and the appendices thereto (*a*). Time to lodge printed cases.

See Standing Order V., *post*, p. 681.

In appeals in which the parties are able to agree in their statement of the subject-matter, it is optional to lodge a joint case with reasons pro and con, following the practice heretofore in use in common law appeals on a special case. Joint case.

It is obligatory on the appellant, within the respective periods so limited as above, to lodge his printed cases, or the joint case before mentioned, and a printed appendix consisting of such documents, or parts thereof, used in evidence in the Court below, as may be necessary for reference on the argument of the appeal. Lodging cases and appendix.

It is the duty of the appellant, with as little delay as possible after the presentation of the appeal, to furnish to the respondent a list of the proposed documents, and in due course a proof copy of the appendix. The proof is to be examined with the original documents by the respective solicitors of the parties. (Ten copies of the appendix as soon as printed, to be delivered to the solicitor of the respondent.) The respondent is allowed to print any additional documents used in evidence in the Court below which may be necessary for the support of his case on the argument of the appeal, such documents to be paged consecutively with the appendix. (The proof to be examined as aforesaid, by the respective solicitors, and prints delivered to the solicitor of the appellant.) Appendix. Additional documents.

The costs incurred in printing the appendix will, in the first instance, be borne by the appellant, and the cost Costs of printing appendix

(*a*) Petitions for extension of time, lodged during the recess, do not prevent the dismissal of an appeal: Note to Official Form. For form of Petition see Appendix C, *post*, p. 685.

Method of Procedure.

of the additional documents by the respondent, but these costs will ultimately be subject to the decision of the House with regard to the costs of the appeal.

and additional documents.

Size of case and appendix.

Copies to be lodged.

The case and appendix must be printed quarto size, with seven or eight letters in the margin for facilitating reference, and should be submitted in proof to the clerks in the judicial office. Forty copies of the case and appendix are required to be lodged in the Parliament office; and subsequently, on the lodgment of the respondent's case, ten bound copies (see directions in the appendix hereto as to binding printed cases).

For directions for binding printed cases, see Appendix B, *post*, p. 684.

Marginal notes of reference.

Where reference is made to a document printed in the appendix, the case must contain a marginal note of the page of the appendix containing such document.

Default of respondent in lodging case.

There is no penalty on respondents who do not lodge their printed cases within the time limited by Standing Order No. V., but respondents can only appear at the bar on a printed case.

For Order V., see *post*, p. 681.

Setting down cause.

As soon as the printed cases of all parties and the appendix thereto have been lodged, it is optional for either side to set down the cause for hearing, but it is obligatory on the appellant, upon the lodgment of his printed cases and the appendix, to set down the cause for hearing within the time limited by Standing Order No. V. (ex parte as to those respondents who have not already lodged printed cases, upon proof, by affidavit, of the due service of the before-mentioned "order of service" upon the respondents or their solicitors). A respondent who has lodged his printed cases is at liberty to set down the cause for hearing on the first sitting day after the expiration of the time limited by the Standing Order for lodging printed cases. The cause will then be ripe for hearing, and will take its position on the effective cause list.

III. STANDING ORDERS.

Standing Orders.

Standing Order I.

Time limited for presenting appeals.

Ordered, that, except where otherwise provided by statute, no petition of appeal be received by this House unless the same be lodged in the Parliament office for presentation to the House within one year from the date of the last decree, order, judgment, or interlocutor appealed from.

See Act of 1876, s. 11, *ante*, p. 132.

Applicable to all decrees, &c., pronounced on and after the 1st November, 1876.

In cases in which the person entitled to appeal be within the age of one and twenty years, or covert, non compos mentis, imprisoned or out of Great Britain and Ireland, such person may be at liberty to present his appeal to the House, provided that the same be lodged in the Parliament office within one year next after full age, discoverture, coming of sound mind, enlargement out of prison, or coming into Great Britain or Ireland. But in no case shall any person or persons be allowed a longer time, on account of mere absence, to present an appeal, than five years from the date of the last decree, order, judgment, or interlocutor appealed against.

See last note.

Standing Order II.

Appeals to be signed and certified by counsel.

Ordered, that all petitions of appeal be signed, and the reasonableness thereof certified, by two counsel who shall have attended as counsel in the court below, or shall purpose attending as counsel at the hearing in this House.

For form of certificate, see *ante*, p. 675.

Standing Order III.

Order of service.

Ordered, that the "order of service" issued upon the presentation of an appeal for service on the respondent or his solicitor, be returned to the Parliament office, together with an affidavit of due service entered thereon, within the time limited for the appellant to lodge his printed cases, unless within that period all the respondents shall have lodged their printed cases; in default, the appeal to stand dismissed.

Standing Orders.

STANDING ORDER IV.

Recognizance.

Ordered, in all appeals that the appellant or appellants do give security to the Clerk of the Parliaments by recognizance to be entered into, in person or by substitute, to the Queen of the penalty of five hundred pounds, conditioned to pay to the respondent or respondents all such costs as may be ordered to be paid by the House in the matter of the appeal; and further that the appellant or appellants do procure two sufficient sureties, to the satisfaction of the Clerk of the Parliaments, to enter into a joint and several bond to the amount of two hundred pounds, or do pay in to the account of the fee fund of the House of Lords the sum of two hundred pounds; such bond, or such sum of two hundred pounds, to be subject to the order of the House with regard to the costs of the appeal: Ordered, that within one week after the presentation of the appeal the appellant or appellants do pay in to the account of the fee fund of the House of Lords the said sum of two hundred pounds, or submit to the Clerk of the Parliaments the names of the sureties proposed to enter into the said bond; and, in the event of a substitute being proposed to enter into the said recognizance, the name of such substitute; two clear days' previous notice of the names so proposed for bond and recognizance to be given to the solicitor or agent of the respondent: *Ordered, that the said bond and the recognizance (whether entered into by the appellants or by a substitute) be re-returned to the Parliament office duly executed within one week from the date of the issue thereof to the solicitor or agent of the appellant or appellants. On default by the appellant or appellants in complying with the above conditions, the appeal to stand dismissed.*

As to the bond and recognizance, see also *ante*, p. 676.

On the 17th March, 1881, the following alteration in the above Standing Order was agreed to:—

"That Standing Order No. IV. applicable to appeals be amended by omitting all words from the word respondent in line 20 to the end of the Order, and inserting in lieu thereof the following words, namely: Ordered that in the event of the Clerk of the Parliaments requiring a justification of the sureties or substitute, the appellant's agent shall within one week from the date of an official notice to him to that effect, lodge in the Parliament office

Standing Orders.

an affidavit or affidavits by the proposed sureties or substitute, setting forth specifically the nature of the property in consideration of which they claim to be accepted as sureties in respect of the bond or as substitute in respect of the recognizance, and also declaring that the property in question is unincumbered: ordered that in the event of such sureties not being deemed satisfactory by the Clerk of the Parliaments, the appellant or appellants shall, within four weeks from the date of an official notice by the Clerk of the Parliaments to that effect, pay into the account of the Fee Fund of the House of Lords the sum of £200, to be subject to the order of the House with regard to the costs of the appeal; and in the event of such substitute not being deemed satisfactory by the Clerk of the Parliaments, the appellant or appellants shall enter into the usual recognizance in person; ordered that the said bond, and the recognizance (whether entered into by the appellants or by a substitute) be returned to the Parliament office duly executed within one week from the date of the issue thereof to the solicitor or agent of the appellant or appellants. On default by the appellant or appellants in complying with the above conditions, the appeal to stand dismissed." *

If default be made in paying the respondent's costs the recognizance may be estreated, and payment of the debt enforced by imprisonment, for the recognizance constitutes a Crown debt, and the Debtors' Act, 1869, does not apply to Crown debts. *Re Smith*, 2 Ex. D. 47.

The judgment of the House of Lords for costs may also be enforced by action. *Marabella Iron Ore Co.* v. *Allen*, 47 L. J. C. P. 601.

Standing Order V.

Printed cases time limited for lodging, and for setting down the cause for hearing.

1. Ordered, that in English appeals the printed cases and the appendix thereto be lodged in the Parliament office within six weeks from the date of the presentation of the appeal to the House; in Scotch and Irish appeals, within eight weeks; and the appeal set down for hearing on the first sitting day after the expiration of those respective periods (or as soon before, at the option of either party, as all the printed cases and the appendix shall have been lodged); on default by the appellant the appeal to stand dismissed.

See *ante*, p. 675.

* See "Solicitors' Journal," 26th March, 1881, p. 389.

Standing Orders.

Scotch appeals.

2. Ordered, that in all appeals from Scotland the appellant alone, in his printed case or in the appendix thereto, shall lay before this House a printed copy of the record as authenticated by the Lord Ordinary; together with a supplement containing an account, without argument or statement of other facts, of the further steps which have been taken in the cause since the record was completed, and containing also copies of the interlocutors or parts of interlocutors complained of; and each party shall in their cases lay before the House a copy of the case presented by them respectively to the Court of Session, if any such case was presented there, with a short summary of any additional reasons upon which he means to insist; and if there shall have been no case presented to the Court of Session, then each party shall set forth in his case the reasons upon which he founds his argument, as shortly and succinctly as possible.

Printed cases to be signed by counsel.

3. Ordered, that all printed cases be signed by one or more counsel, who shall have attended as counsel in the court below, or shall purpose attending as counsel at the hearing in this House.

Standing Order VI.

Cross appeals.

Ordered, that all cross-appeals be presented to the House within the period allowed by Standing Order No. V. for lodging cases in the original appeal.

Standing Order VII.

Expiry of time during recess.

Ordered, with regard to appeals in which the periods *severally dating from the presentation of the appeal* under Standing Orders Nos. III., IV., V., and VI. expire during the recess of the House, that such periods be extended to the third sitting day of the next ensuing meeting of the House.

See Act of 1876, s. 8, *ante*, p. 131.

Standing Order VIII.

Supplemental cases to be delivered in, where appeals are revived or parties added.

Ordered, that where any party or parties to an appeal shall die pending the same, subsequently to the printed cases having been lodged, and the appeal shall be revived against his or her representative or representatives as the person or persons standing in the place of the person or

persons so dying as aforesaid, a su
be lodged by the party or parties
respectively, stating the order or or
by the House in such case.

The like rule shall be observed
respondent respectively, where any
party or parties in the court below,
be made a party or parties in th
House, and shall, by leave of the H
otherwise, be added as a party or
appeal after the printed cases in su
been lodged.

STANDING ORDER

Ordered, that when any petition
presented to this House from any int
of either division of the Lords of Ses
counsel who shall sign the said pet
counsel for the party or parties in th
sign a certificate or declaration, stati
was given by that division of the
such interlocutory judgment to the
lants to present such petition of appe
a difference of opinion amongst the
division pronouncing such interlocuto

STANDING ORDER

Ordered, that in all cases in whic
make any order for payment of cost
parties in any cause without specifyin
Clerk of the Parliaments or clerk as
the application of either party, appoin
shall think fit to tax such costs, and
pointed may tax and ascertain the an
shall report the same to the Clerk of
clerk assistant: And it is further orde
fees shall be demanded from and paid b
ing for such taxation for and in resp
now or shall be fixed by any resoluti
concerning such fees; and the said pe
to tax such costs may, if he thinks fit,
duct the whole or a part of such fees
report: And the Clerk of the Parliame
tant may give a certificate of such cos
amount so reported to him as aforesaid;

Standing Orders. in money certified by him in such certificate shall be the sum to be demanded and paid under or by virtue of such order as aforesaid for payment of costs.

Forms.

APPENDIX A.

Certificate of Sufficiency of Sureties, &c.

Certificate of sufficiency of sureties.

Lodged in the Parliament office on the day of , 18 .

In the House of Lords.

"A. and others *v.* B. and others."

In compliance with Standing Order No. IV., I [we] submit the names of (*full name*) of (*address*) and (*full name*) of (*address*), as fit and proper sureties [*or*, as a fit and proper substitute] to enter into the bond [*or* recognizance] thereby required: and I [we] certify in my [our] belief, that the said (*full name*), and the said (*full name*), are each [is] worth upwards of £200 [£500] over and above their [his] just debts.

(*This certificate may be signed by the country solicitor or agent of the appellants.*)

As to this certificate, see *ante*, p. 675.

Certificate of service.

I [we] certify that a copy of the above certificate and two clear days' notice of the intention to lodge the same in the Parliament office has been served on the solicitors or agents of the respondents.

(*To be signed by the London solicitor or agent of the appellants.*)

APPENDIX B.

Directions for binding cases.

Directions for Binding Printed Cases for the use of the Law Lords.

1. Ten copies bound in purple cloth; two of the ten to be interleaved, as regards the cases only.
2. Short title of cause on the back.
3. Label on side, stating short title of cause and contents of the volume, thus:—

"A——— and others *v.* B——— and others."

Printed copy of the appeal.

Forms.

Appellants' case.
Respondent B.'s case.
Respondent C.'s case.
Appendix.

4. The volume to be indented, and the names of the parties written on the indentations to their respective cases.

5. References to the reports of the cause in the courts below, or the words "Not reported," to be written on the fly sheet.

6. The bound copies to be lodged immediately after the respondents' cases are delivered in.

The agents are requested to use their discretion as to the size of the volume, arrangement of the cases, and appendix. In dealing with bulky cases, it may be found advisable to bind the appendix as a separate volume, and also to divide the appellants' and respondents' cases into separate volumes.

It is the duty of the appellants' agent to carry out these directions.

APPENDIX C.

Petition for Extension of Time to Lodge Cases, &c. Petition for time.

(To be engrossed on foolscap paper, and (unless assent of respondent's agent be obtained) a copy, and two clear days' notice of intention to present, to be given to respondent's agent.)

In the House of Lords.

(Insert short title of cause.)

To the Right Honourable the Lords Spiritual and Temporal in Parliament assembled.

The humble petition of the appellant

Sheweth, That the petitioner presented petition of appeal on the day of complaining of (*insert dates of orders or interlocutors complained of*).

That the time allowed by Standing Order No. V. [*or* extended by your lordships' order of the (*state date*)] for

Forms.

the appellant to lodge his printed cases and the appendix, will expire on the (*state date*).

That your petitioner (*set forth cause of delay*).

Your petitioner therefore humbly prays that your lordships will be pleased to grant him (*set forth time required*) further time to lodge his printed cases, and the appendix, and set down the cause for hearing.

And your petitioner will ever pray.

, Agents for the appellant.

We consent to the prayer of the above petition,

, Agents for the respondent.

As to this petition, see *ante*, p. 674. For Standing Order V., see *ante*, p. 681.

ORDER IN COUNCIL AS TO DISTRICT REGISTRIES.

12th Aug. 1875.

AT THE COURT AT OSBORNE HOUSE, ISLE OF WIGHT, THE 12TH DAY OF AUGUST, 1875.

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

Whereas by "The Supreme Court of Judicature Act, 1873," it is enacted that it shall be lawful for Her Majesty, by Order in Council, from time to time to direct that there shall be District Registrars in such places as shall be in such order mentioned for districts to be thereby defined, from which writs of summons for the commencement of actions in the High Court of Justice may be issued, and in which such proceedings may be taken and recorded as are hereinafter mentioned; and Her Majesty may thereby appoint that any registrar of any County Court, or any Registrar or Prothonotary or District Prothonotary of any local Court whose jurisdiction is hereby transferred to the said High Court of Justice, or from which an appeal is hereby given to the said Court of Appeal, or any person who, having been a District Registrar of the Court of Probate, or of the Admiralty Court shall under this Act become and be a District Registrar of the said High Court of Justice, or who shall hereafter be appointed such District Registrar, shall and may be a District Registrar of the said High Court for the purpose of issuing such writs as aforesaid, and having such proceedings taken before him as are hereinafter mentioned:

See Act of 1873, s. 60, *ante*, p. 65.

And whereas by "The Supreme Court of Judicature Act, 1875," it is provided that where any such Order has been made, two persons may, if required, be appointed to

12th Aug. 1875.

perform the duties of District Registrar in any district named in the Order: and such persons shall be deemed to be joint District Registrars, and shall perform the said duties in such manner as may from time to time be directed by the said Order, or any Order in Council amending the same:

See Act of 1875, s. 13, *ante*, p. 107.

And whereas it has seemed fit to Her Majesty, by and with the advice of Her Privy Council, that there should be District Registrars in certain places in England: Now, therefore, Her Majesty, by and with the advice aforesaid, is pleased to order, and it is hereby ordered, as follows:—

That there shall be District Registrars in the places of Liverpool, Manchester, and Preston, and the District Registrar at Liverpool of the High Court of Admiralty, and the District Prothonotary at Liverpool of the Court of Common Pleas at Lancaster shall be and are hereby appointed the District Registrars in Liverpool; and the District Prothonotary at Manchester of the said Court of Common Pleas shall be and is hereby appointed the District Registrar in Manchester; and the District Prothonotary at Preston of the said Court of Common Pleas shall be and is hereby appointed the District Registrar in Preston; and that the district for each such place shall be the district now assigned to each such District Prothonotary, under the provisions and authority of "The Common Pleas at Lancaster Amendment Act, 1869."

That there shall be a District Registrar in Durham, and that the District Prothonotary of the Court of Pleas at Durham shall be and is hereby appointed the District Registrar in Durham; and that the district shall be the district, for the time being, of the County Court holden at Durham.

That, in the places mentioned in the Schedule annexed, there shall be District Registrars, and that the Registrar of the County Court held in any such place shall be and is hereby appointed the District Registrar in such place, and that the district for each such place shall be the district, for the time being, of the County Court holden at such place.

C. L. PEEL.

SCHEDULE TO THE FOREGOING ORDER.

Schedule.

Bangor.
Barnsley.
Barnstaple.
Bedford.
Birkenhead.
Birmingham.
Boston.
Bradford.
Bridgewater.
Brighton.
Bristol.
Bury St. Edmunds.
Cambridge.
Cardiff.
Carlisle.
Carmarthen.
Cheltenham.
Chester.
Colchester.
Derby.
Dewsbury.
Dover.
Dorchester.
Dudley.
East Stonehouse.
Exeter.
Gloucester.
Great Grimsby.
Great Yarmouth.
Halifax.
Hanley.
Hartlepool.
Hereford.
Huddersfield.
Ipswich.
Kingston-on-Hull.
Kings Lynn.
Leeds.
Leicester.
Lincoln.
Lowestoft.
Maidstone.
Newcastle-upon-Tyne.
Newport, Monmouth.
Newport, Isle of Wight.
Newtown.
Northampton.
Norwich.
Nottingham.
Oxford.
Pembroke Docks.
Peterborough.
Poole.
Portsmouth.
Ramsgate.
Rochester.
Sheffield.
Shrewsbury.
Southampton
Stockton-on-Tees.
Sunderland.
Swansea.
Truro.
Totnes.
Wakefield.
Walsall.
Whitehaven.
Wolverhampton.
Worcester.
York.

ORDERS IN COUNCIL AS TO JUDGES' CIRCUITS.

5th Feb. 1876.

I. ORDER DATED 5TH FEBRUARY, 1876.

AT THE COURT AT OSBORNE HOUSE, ISLE OF WIGHT, THE 5TH DAY OF FEBRUARY, 1876.

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS by section 23 of the Supreme Court of Judicature Act, 1875, it is enacted that Her Majesty may at any time after the passing of the Act, by Order in Council, provide in such manner and subject to such regulations as to Her Majesty may seem most meet for all or any of the matters thereinafter specified, amongst which were the discontinuance, either temporarily or permanently, wholly or partially, of any existing circuit, and the formation of any new circuit by the union of any counties or parts of counties, or partly in one way and partly in the other, or by the constitution of any county or part of a county to be a circuit by itself; and in particular the issue of commissions for the discharge of civil and criminal business in the county of Surrey, to the Judges appointed to sit for the trial by jury of causes and issues in Middlesex or London, or any of them; and the appointment of the place or places at which assizes are to be holden on any circuit; and by the same section it is further enacted that in making any Order thereunder Her Majesty may give any directions which it appears to Her Majesty to be desirable to give for the purpose of giving full effect to such Order:

See Act of 1875, s. 23, *ante*, p. 113.

It is therefore ordered by the Queen's most Excellent

Majesty, by and with the advice of Her most Honourable Privy Council, as follows:— 5th Feb. 1876.

1. The existing circuits shall be discontinued, and instead thereof the circuits shall be those named in the first column of the schedule hereto.

2. The said circuits shall be respectively constituted as specified in the second column of the said schedule, and the places where the assizes may be held shall be the places at which assizes have hitherto been held.

3. Nothing in this order shall affect the provisions of an Order in Council made on the 4th day of May, 1864, relating to the division of the county of Lancaster into three divisions, or the provisions of an Order in Council made on the 10th day of June, 1864, as amended by an Order in Council made on the 9th day of July, 1864, relating to the division of the county of York into two divisions.

4. The North and South Wales circuit shall be divided into two Divisions, the North Wales Division and the South Wales Division; and such Divisions shall be respectively constituted as specified in the second column of the said schedule.

5. The county of Surrey shall not be included in any circuit, but commissions shall be issued not less often than twice in every year for the discharge of civil and criminal business therein.

6. With respect only to the first time after the date of this Order that justices of assize go the several circuits as constituted by this Order, and with respect only to the first sessions held after the date of this Order under commissions for the discharge of civil and criminal business in the county of Surrey, the following arrangements shall be observed:

But see Order in Council of 17th May, 1876, *post*, p. 695.

With respect to the Northern Circuit:—

In the county of Cumberland and the county of Westmoreland, Edward Bromley, Esq. (hitherto clerk of assize on the northern circuit, as discontinued by this Order), and his officers, shall be clerk of assize and officers of clerk of assize. In the

5th Feb. 1876.

county of Lancaster, so far as relates to the discharge of criminal business, Thomas Starkie Shuttleworth, Esq. (hitherto clerk of the crown for the same county), and his officers, shall be clerk of assize and officers of clerk of assize; and so far as relates to the discharge of civil business, Thomas Edmund Paget, Esq. (formerly prothonotary of the Court of Common Pleas in the same county), and his officers, shall be clerk of assize and officers of clerk of assize.

With respect to the North-Eastern Circuit:—

In the county of Durham, so far as relates to the discharge of criminal business, John Wetherell Hays, Esq. (hitherto clerk of the crown for the same county), and his officers, shall be clerk of assize and officers of clerk of assize; and so far as relates to the discharge of civil business, William C. Ward, Esq. (formerly prothonotary of the Court of Common Pleas in the same county), and his officers, shall be clerk of assize and officers of clerk of assize; and on the rest of the circuit, Edward Bromley aforesaid, and his officers, shall be clerk of assize and officers of clerk of assize.

With respect to the Midland Circuit:—

Arthur Duke Coleridge, Esq. (hitherto clerk of assize on the midland circuit, as discontinued by this Order), and his officers, shall be clerk of assize and officers of clerk of assize.

With respect to the South-Eastern Circuit:—

In the county of Norfolk, the county of the city of Norwich, the county of Suffolk, the county of Huntingdon, and the county of Cambridge, Charles Platt, Esq. (hitherto clerk of assize on the Norfolk circuit, as discontinued by this Order), and his officers, shall be clerk of assize and officers of clerk of assize; and in the county of Hertford, the county of Essex, the county of Kent, and the county of Sussex, the Honourable Richard Denman (hitherto clerk of assize on the home circuit, as discontinued by this Order), and his officers, shall be clerk of assize and officers of clerk of assize.

5th Feb. 1876.

With respect to the Oxford Circuit :—

Edward Archer Wilde, Esq. (hitherto clerk of assize on the Oxford Circuit, as discontinued by this Order), and his officers, shall be clerk of assize and officers of clerk of assize.

With respect to the Western Circuit :—

William Channell Bovill, Esq. (hitherto clerk of assize on the western circuit, as discontinued by this Order), and his officers, shall be clerk of assize and officers of clerk of assize.

With respect to the North and South Wales Circuit :—

In the North Wales Division thereof, Henry Crompton, Esq. (hitherto clerk of assize in the North Wales Division of the North and South Wales circuit, as discontinued by this Order), and his officers, shall be clerk of assize and officers of clerk of assize ; and in the South Wales division there of Henry Alfred Vaughan, Esq. (hitherto clerk of assize in the South Wales Division of the North and South Wales circuit, as discontinued by this Order), and his officers, shall be clerk of assize and officers of clerk of assize.

With respect to the county of Surrey :—

The Hon. Richard Denman aforesaid, and his officers, shall be clerk of assize and officers of clerk of assize for the first sessions held under commissions issued for the discharge of civil and criminal business in the said county.

C. L. PEEL.

SCHEDULE TO THE FOREGOING ORDER.

Name of Circuit.	*Constitution of Circuit.*
Northern Circuit... ...	County of Westmoreland. County of Cumberland. County of Lancaster.
North-Eastern Circuit...	County of Northumberland. County of the Town of Newcastle-upon-Tyne.

5th Feb. 1876.	*Name of Circuit.*	*Constitution of Circuit.*
		County of Durham.
		County of York.
		County of the City of York.
	Midland Circuit ...	County of Lincoln.
		County of the City of Lincoln.
		County of Nottingham.
		County of the Town of Nottingham.
		County of Derby.
		County of Warwick.
		County of Leicester.
		Borough of Leicester.
		County of Northampton.
		County of Rutland.
		County of Buckingham.
		County of Bedford.
	South-Eastern Circuit...	County of Norfolk.
		County of the City of Norfolk.[1]
		County of Suffolk.
		County of Huntingdon.
		County of Cambridge.
		County of Hertford.
		County of Essex.
		County of Kent.
		County of Sussex.
	Oxford Circuit... ...	County of Berks.
		County of Oxford.
		County of Worcester.
		County of the City of Worcester.
		County of Stafford.
		County of Salop.
		County of Hereford.
		County of Monmouth.
		County of Gloucester.
		County of the City of Gloucester.
	Western Circuit ...	County of Southampton.
		County of Wilts.
		County of Dorset.
		County of the City of Exeter.
		County of Devon.
		County of Cornwall.
		County of Somerset.
		County of the City of Bristol.

[1] *Sic.* Query Norwich.

Name of Circuit.	*Constitution of Circuit.*	5th Feb. 1876.
North and South Wales Circuit	(*a*) North Wales Division :— County of Montgomery. County of Merioneth. County of Caernarvon. County of Anglesea. County of Denbigh. County of Flint. County of Chester. (*b*) South Wales Division :— County of Glamorgan. County of Camarthen. County of the Borough of Carmarthen. County of Pembroke. County of the Town of Haverfordwest. County of Cardigan. County of Brecknock. County of Radnor.	

II. ORDER DATED 17TH MAY, 1876.

17th May, 1876.

AT THE COURT AT WINDSOR, THE 17TH DAY OF MAY, 1876.

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS by an Order in Council, dated the 5th day of February, 1876, and made in pursuance of section 23 of the Supreme Court of Judicature Act, 1875, it was ordered that certain arrangements as to the circuits constituted by the said Order, and as to sessions held under commissions for the discharge of civil and criminal business in the county of Surrey should be observed, subject to a provision whereby the said arrangements were limited in duration so as to operate with respect only to the first time after the date of the said Order that justices of assize should go the several circuits as constituted by the

17th May, 1876.

said Order, and with respect only to the first sessions that should be held after the date of the said Order, under commissions for the discharge of civil and criminal business in the county of Surrey; And whereas it is expedient to revoke the said limitation:

It is therefore ordered by the Queen's most Excellent Majesty, by and with the advice of Her most Honourable Privy Council, as follows:—

So much of the said Order in Council as limits the duration of the arrangements therein contained as to circuits and as to sessions holden under commissions for the discharge of civil and criminal business in the county of Surrey is hereby revoked, and the said arrangements shall continue to operate until modified or revoked by any Order in Council hereafter to be made.

C. L. PEEL.

WINTER ASSIZES ACT, 1876.

39 & 40 VICT. c. 57.

An Act to amend the law respecting the holding of Winter Assizes. **Act 1876, ss. 1, 2.**

[10th August, 1876.]

WHEREAS it is usual to hold winter assizes in some counties, and not to hold them in other counties in which there are but few prisoners awaiting trial, and it is expedient to provide for the more speedy trial of such last-mentioned prisoners:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:

Sect. 1. Short title.

1. This Act may be cited as the Winter Assizes Act, 1876.

Sect. 2. Power by Order in Council to unite counties for purpose of winter assizes.

2. Where it appears to Her Majesty that by reason of the small number of prisoners or otherwise it is usually inexpedient to hold separate winter assizes for any county, it shall be lawful for Her Majesty by Order in Council from time to time to provide in such manner and subject to such regulations as to Her Majesty may seem meet for all or any of the following matters:

(1.) For uniting such county for the purpose of winter assizes to any neighbouring county or counties; and

(2.) For the appointment of the place or places at which winter assizes are to be held for such united counties, with power to direct that they shall be held at different places in different years; and

Act 1876, ss. 2, 5.

(3.) For the jurisdiction of the Court and the attendance, jurisdiction, authority, and duty of sheriffs, gaolers, officers, jurors, and persons, the use of any prison, the removal of prisoners, the alteration of any commissions, writs, precepts, indictments, recognizances, proceedings, and documents, the transmission of recognizances, inquisitions, and documents, and the expenses of prosecutors and witnesses, and of maintaining and removing prisoners, so far as may seem to Her Majesty necessary for carrying into effect an Order in Council under this Act; and

(4.) For any matters which appear to Her Majesty to be necessary or proper for carrying into effect an Order in Council under this Act.

An Order in Council purporting to be made in pursuance of this Act shall be deemed to be within the powers of this Act, and shall while it is in force have effect as if it were enacted in this Act, and for all the purposes of the holding of the winter assizes the counties united by the Order shall, subject to the provisions of the Order, be deemed to be one county, and the winter assizes held in and for such united county shall be deemed also to be held in and for each of the constituent counties.

Sect. 3. Provision as to Order in Council.

3. Her Majesty may from time to time by Order in Council revoke, alter, or add to any Order made in pursuance of this Act.

Every Order in Council made in pursuance of this Act shall be published in the London Gazette and laid before both Houses of Parliament within one month after it is made, if Parliament is then sitting, and if not, within one month after the then next meeting of Parliament.

Sect. 4. Application of existing Acts as to alteration of circuits.

4. All enactments relating to the power of Her Majesty to alter the circuits of the Judges, or places at which assizes are holden, or otherwise relating to assizes and circuits, shall apply and may be put in force for the purpose of carrying into effect this Act or any Order made thereunder.

Sect. 5. Provision for neighbouring counties to

5. It shall be lawful for Her Majesty from time to time by Order in Council to direct that, subject to any exceptions contained in the Order, the jurisdiction of the Justices and Judges of the Central Criminal Court at any

session of oyer and terminer and gaol delivery held for the Central Criminal Court district in the months of November, December, or January shall extend to any neighbouring county or part of a county mentioned in the Order as if such county or part of a county were included within the limits of the Central Criminal Court district, and to apply, with such modifications and exceptions (if any) as to Her Majesty may seem fit, the Central Criminal Court Act to the said county or part of a county and offences committed therein as if the same were a county or part of a county mentioned in that Act.

Act 1876, ss. 5, 6.

Central Criminal Court district.

An Order in Council purporting to be made in pursuance of this section shall be deemed to be within the powers of this Act, and shall, while it is in force, have effect as if it were enacted in this Act.

6. In this Act—

Sect. 6. Definitions

The expression "winter assizes" means any court of assize or any sessions of oyer and terminer or gaol delivery held in the month of November, the month of December, or the month of January.

The expression "Central Criminal Court district" means the district within the limits of the Act of the session of the fourth and fifth years of the reign of King William the Fourth, chapter thirty-six, intituled "An Act for establishing a new Court for the trial of offences committed in the metropolis and parts adjoining;" and the expression "Central Criminal Court Act" means the last-mentioned Act.

The expression "county" in this Act shall include any county of a city or county of a town, and any such division of any county as is constituted by Order in Council under the Act passed in the third and fourth years of King William the Fourth, chapter seventy-one, and intituled "An Act for the appointment of convenient places for the holding of assizes in England and Wales."

WINTER ASSIZES ACT, 1877.

40 & 41 VICT. c. 46.

Act 1877. An Act to extend the provisions of the Winter Assizes Act, 1876.

[10th August, 1877.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Sect. 1. Amendment of 39 & 40 Vict. c. 57.

1. The Winter Assizes Act, 1876, shall take effect as if, wherever in that Act the month of November is mentioned, there were added the months of September and October.

Sect. 2. Short title.

2. This Act may be cited as the Winter Assizes Act, 1877; and the Winter Assizes Act, 1876, and this Act may be cited together as the Winter Assizes Acts, 1876 and 1877.

SPRING ASSIZES ACT, 1879.

42 VICT. c. 1.

An Act to amend the Law respecting the holding of Assizes. Act 1879, ss. 1, 2, 3.

[14th March, 1879.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Spring Assizes Act, 1879. Sect. 1. Short title.

2. Whereas it is expedient to enable Her Majesty to unite counties for the purpose of holding spring assizes in the manner in which Her Majesty is authorised to unite counties for the purpose of holding winter assizes, and to make similar provision in relation to the jurisdiction of the Central Criminal Court over offences committed in the neighbouring counties to that which Her Majesty is able to make under the Winter Assizes Act, 1876: Be it therefore enacted as follows: Sect. 2. Extension to spring assizes of power of Her Majesty as to winter assizes. 39 & 40 Vict. c. 57.

All the provisions of the Winter Assizes Act, 1876, shall be deemed to be herein enacted, with the substitution of "spring assizes" for "winter assizes," and of the months of March, April, and May for the months of November, December, and January respectively; provided that nothing in this Act, or the Winter Assizes Acts, 1876 and 1877, shall affect the custom of holding separate assizes in and for each county twice a year. 39 & 40 Vict. c. 57. 40 & 41 Vict. c. 46.

3. Notwithstanding anything in the Prison Act, 1877, or anything done in pursuance of that Act, where judgment of death has been passed upon a convict at any Sect. 3. Execution of sentence of death. 40 & 41 Vict. c. 21.

Act 1879, ss. 3, 4.

assizes held after the passing of this Act, the judgment may be carried into execution in any prison in which the convict was confined for the purpose of safe custody prior to his removal to the place where the assizes were held, and the sheriff of the county for which such assizes were held shall be charged with the execution of that judgment, and shall for that purpose have the same jurisdiction and powers, and be subject to the same duties in the prison in which the judgment is to be carried into execution, although such prison is not situate within his county, as he has by law with respect to the common gaol of his county, or would have had if the Prison Act, 1865, and the Prison Act, 1877, had not passed.

28 & 29 Vict. c. 126.
40 & 41 Vict. c. 21.

The coroner, whose duty it is to hold an inquest on the bodies of prisoners dying in any prison shall hold an inquest in accordance with the Capital Punishment Amendment Act, 1868, on the body of any convict executed in that prison.

31 & 32 Vict. c. 24.

Nothing in this section shall affect any power authorised to be exercised by Order in Council under the Winter Assizes Act, 1876, and this Act.

39 & 40 Vict. c. 57.

Sect. 4. Definitions.

4. In this Act—

The expression "assizes" means any court of assize or any sessions of oyer and terminer or gaol delivery:

The expression "county" includes a county of a city and a county of a town, and any such division of a county as is constituted by Order in Council under the Act of the session of the third and fourth years of King William the Fourth, chapter seventy-one, intituled "An Act for the appointment of convenient places for the holding of assizes in England and Wales," and the sheriff for a county so divided shall for the purposes of this Act be deemed to be the sheriff for such division of a county.

CENTRAL OFFICE PRACTICE RULES.

Office Rules settled by the Practice Masters, 1880, 1881, 1882.

Documents to be filed in the Writ and Appearance and Summons and Order Departments.

Originating summonses issued from Chancery Chambers.
Petitions of right.
Affidavits of service.
Lower scale certificates (Chancery).
Schemes of arrangement under Railway Abandonment Act.
Pleadings left on entering judgment (order xli. rule 1).
Pleadings and other documents filed under order xix. rule 6, in default of appearance.
Writs and returns to writs, orders, &c.
All documents required by rules or orders of court to be filed, such as warrants of attorney, and cognovits on signing judgments (rule 25, of Hilary, 1853), orders for assessment of damages and masters' findings thereon (rule 171, of Hilary, 1853), also satisfaction pieces and orders to satisfy, strike out, or amend any judgment or proceeding, or directing any act to be done in the office (except Chancery orders and orders of court in Queen's Bench Division). [A copy of the order marked that the original was produced may be taken at the discretion of the officer in cases in which the original is required to be retained by the parties.]
All pleadings to be entered in the cause-books are to be opened and stamped on the day of filing, with the date seal at the top of the front page, and returned to the General Filing Department on Monday morning in each week.
Copies writs filed.
Præcipes for writs of execution.

Præcipes for subpœnas and miscellaneous writs.
Appearances.
Lower scale certificates.
Certificate of costs.

All these should be sent to the General Filing Department when more than a year old.

Orders of commitment and returns thereto may be filed and indexed in the writ, &c., department in the same way as (and with) writs of execution.

Cause Book, Distinctive Marks, and Indexes.

Actions and matters in the title of which a limited company is first must be indexed under the first letter of the first word or initial.

Courtesy titles of eldest sons of Peers are not to govern the distinctive mark which is to follow the surname, viz., "Campbell," and not "Marquis of Lorne."

In cases, such as Mayor and Corporation of, &c., the initial letter of the city or borough should govern the distinctive mark.

Owners of ships by name of ship.

Overseers of parishes by names of parish.

Names in which "de" occurs as part of the surname, or is preceded only by Christian names, should be indexed under "D."

Foreign companies should be indexed under the initial letter of the first word in their name, *e.g.*, Banco de Lima under "B," Société d'Aclimatisation, "S."

Foreign titles should be indexed under the initial letter of the proper or local name in the title, *e.g.*, Comte de Paris under "P," Duc de Montebello under "M."

The Christian and surnames of all parties to an action should be entered in full in the cause book.

Parties are not to be allowed to see the cause book unless by express leave obtained from a master or an order by a judge.

All searches in the cause book for writs of summons or otherwise are to be made by the clerks in the Central Office, and the result communicated to the party applying.

When a certificate is given, and no inspection of a præcipe is required, only one fee of 1s. to be taken (or 4s. if higher scale).

A separate index is to be kept of writs in administration actions and of administration summonses, which index the public may search without fee.

Separate books are to be kept for entering returns to

writs of execution, index to lower scale certificates in Chancery matters not actions, and return books and debt attachment book.

No other books to be kept for entries except the cause books (and desk book for facilitating reference). The judgment books may be kept in the cause book room with the cause books, or in a separate room.

Writs of Summons, Appearances, and Amendments.

Copies of writs of summons should be signed with the name of the solicitor or solicitors' clerks suing them out as under :—

C.D. and Co.
or A.B.
for C.D. and Co.

The stamp is to be on the copy writ filed.

In the Chancery Division an order of course to amend a writ of summons as the plaintiff may be advised will not justify an alteration that strikes out the name of any plaintiff or defendant, or makes a person out of the jurisdiction a party.

In all the divisions an amendment of a writ of summons may be made by leave of a master (on payment of fee) before service. A plaintiff can be struck out only by special leave given in the order to amend ; a defendant, by special leave, or on the written statement (to be filed) of the plaintiff's solicitors that a notice of discontinuance under order xxiii. has been duly given.

In Chancery actions an amendment to a writ of summons pursuant to an order of court or judge, may be made either on an undertaking to get the order drawn up, or on a separate memorandum or certificate being left for filing, signed or initialed by the judge or registrar, showing the order to have been made.

In an information, where there is no relator, the Attorney-General's signature on the writ is not required ; but where there is a relator (whether a person or body corporate) the original writ (not the copy filed) must be signed by the Attorney-General, and if any amendment be made, it must be authorized by his signature on the original writ or draft.

In entering appearances a note should be made in the cause books "Statement of claim required" or "Statement of claim not required," and in cases where the action

is for recovery of land, and the defence is limited, a further note to that effect should be added.

If no time is specified in an order to amend, the amendment must be made within 14 days.

No writs are to be issued in Probate Division causes unless on a certificate that the affidavit required by order v. rule 10, has been filed.

Where appearances are entered in the Central Office in Probate and Admiralty Division actions, a list or copy of the appearances entered shall each day be addressed and sent to the principal registrars of the Probate and Admiralty Divisions. Such list to be made out at the close of the day by one of the junior clerks in the writ, &c., department.

If a solicitor has caused an appearance to be entered by mistake, the mistake may be rectified with the consent in writing of the solicitor for the plaintiffs, and on the fiat (on the production of such consent) of a practice master to be given on a præcipe with a 2s. 6d. (search) stamp.

A defendant in person may change his address for service (without order to change address) by leave of master, but must forthwith give notice to the other side.

In the case of infants the appearance is accepted without any authority or order; an order being obtained by the defendant's solicitor after the appearance has been entered.

In the case of a married woman, an order to defend separately must be obtained before appearance is entered.

If a writ of summons has been lost the filed copy may, for the purpose of amendment, or for any other purpose, be treated as a duplicate, but only by leave of a practice master, and on the party giving an undertaking to produce the original at the Central Office when found.

Writs of summons issued before the Judicature Acts came into force may be renewed without an order.

A female plaintiff must be described as "spinster," "married woman," or "widow," and if an infant, as an infant.

Where an infant or married woman is plaintiff the authority of the next friend (duly attested) must be filed before the writ of summons can be issued.

Substituted Service. Affidavit of Service.

Unless the order shall otherwise direct, a copy of the order and of the writ shall be deemed to have been served

on the day following the day on which a prepaid letter containing such copy shall have been posted.

Subpœnas.

Subpœnas remain in force only till the end of the sitting or assize for which they were issued. A new writ must afterwards be issued or the former writ may be (at the option of the parties) altered as to date and sitting, or assize, and re-issued as a new writ.

The date of return in the writ and præcipe may, before service, be amended without the direction of a master, and without fee, provided the amended date be within the sitting or assize for which the subpœna issued.

A subpœna in an interpleader issue should be headed in the title of the original action, and in the title of the interpleader issue, and should be applied for in, and issued out of, the room in which the writ of summons in the original action was issued.

Removal by Appearance to London of Actions commenced in District Registries.

A fresh London distinctive mark to be given.

No separate district registry cause book to be kept.

No letter need be sent to the district registrar.

Writs of summons issued out of a district registry cannot be amended by order or fiat of master unless the action has been removed to London by appearance or otherwise.

No writ issued out of a district registry can be amended in the Central Office unless the duplicate filed in the district registry has been previously received in the Central Office.

If it becomes necessary to send to London (for amendment or otherwise) the copy writ filed in the district registry, authority may be given to send the copy writ to the Central Office by sealing a duplicate of the præcipe for appearance, which shall be transmitted to the district registrar by the solicitors concerned.

Distringas.

When the settlement comprises more than one sum, and the sums are in the shares or securities of different companies, a separate affidavit and notice should be made for each company, and the affidavit should be that the

funds comprise "amongst others" the sum of, &c. [specifying the sum in the books of the one company], and a stamp of 10s. will be required for each separate notice.

If there are more sums than one, but all in the books of the Bank of England, or in the books of any one company, one affidavit and notice will be sufficient for all the sums.

In actions not specifically assigned to the Chancery Division by the Judicature Act, 1873, s. 34 (*i.e.*, so called common law actions brought in the Chancery Division), no certificate of lower scale shall be given out till after appearance. In the cause books such actions shall be distinguished by the letters L.S.

When deposited documents, or documents on the file, are ordered to be delivered to a solicitor, on his undertaking to return them, he must sign a receipt and undertaking to return (which may be indorsed on the order), and leave the order and indorsement at the Central Office to be returned to him on his bringing back the documents. The signature of the solicitor must be witnessed by his clerk, or by someone known to the officer delivering out the documents.

Pleadings and Documents filed in Default.

None of these documents will be placed in the bundles containing the writs of summons and pleadings filed on entering judgment, but will be made up into two sets of separate bundles.

The first containing all statements of claim filed in default.

The second containing summonses, warrants to tax, notices, and miscellaneous documents.

All these documents must have the date of filing and the name of the defendant against whom they were filed written on them, and be entered in the cause books under the head of pleadings, such entry to show the date of filing, nature of document, and name of defendant against whom they are filed.

None of these documents will (for the present) be delivered out without an order, but any defendant against whom documents have been filed may, after appearance, inspect the same without fee.

As to Filing generally.

In the Chancery Division, judgments, orders, notices of motion for attachment, and other documents requiring personal service, cannot be filed in default of appearance without an order or leave of a master, and no pleadings or other documents can be filed under order xix. rule 6, unless an affidavit of service under order xiii. rules 2 and 9, or an office copy thereof, be first produced to the officer.

Orders and Judgments.

When parties have not drawn up their orders on the day of the hearing of the summons, the solicitor shall, before having his order issued, take it to the filing office, and having indorsed on the back the words "The affidavits referred to within are on the file," the seal will be affixed to certify that the affidavits are filed. Such certificates will have the same effect as producing the affidavits on drawing the order.

As to county court certificate of result of trial, no fee to be charged for search.

Judgment may be signed on a certificate of "No affidavits filed in answer to interrogatories," or on a certificate of non-payment of money into court without affidavit.

On entering judgments under order xli. rule 1, in actions in the Chancery Division, when drawn up by the chancery registrars, the engrossment of the judgment together with the pleadings to be filed shall be brought to the writ appearance and judgment department, and the officer receiving the same shall make a note in the margin of the engrossment that the pleadings have been filed, and shall authenticate such note with the small seal of the office, and return the engrossment to the solicitor.

The date of the judgment as shown by the engrossment of the order and the date of leaving the pleadings shall be entered in the cause book.

The solicitor on leaving the pleadings must indorse thereon and sign a certificate in the words or to the effect following :—

"I certify that these are all the pleadings required to be left for filing."

When judgment is signed under order xli. rules 4 and 5, on any order, certificate, or other document, such document shall be filed.

Original stamped judgment to be filed and office copy

to be delivered out at 6d. a folio. The judgment need not be signed by the solicitor entering it.

If judgment removed from Lord Mayor's Court the fixed cost of removal to be one guinea in all cases.

An allocatur for costs is to be placed on a certificate in the form settled.

Judgments are to be numbered consecutively in each alphabetical division in the right-hand corner, and the number entered in the cause book.

In cases where the plaintiff is entitled to a final judgment as to part of his claim, and to an interlocutory judgment as to the remainder, one judgment only is necessary, final as to part and interlocutory as to the rest, and one fee paid.

In the case of cross judgments in the same action where after a trial there is a direction for judgment for plaintiff against some of the defendants, and for some of the defendants against the plaintiff, and also for some of the defendants against the others, the whole direction may be embodied in one judgment, and the different parties may take office copies for use.

Date of filing of pleadings filed on entering judgment and of certificates of costs are to be entered in cause books and on the documents.

As to Costs on Judgments for Default of Appearance.

	£	s.	d.
In town cases	3	14	0
In country and agency cases and cases in which service effected beyond five miles from General Post Office, St. Martin's-le-Grand	4	6	0

And 6s. in addition for each service beyond one defendant.

The above allowances include all mileage.

As to the Costs of Removing Judgments from Inferior Courts for Purposes of Execution.

The order should direct that the party removing the judgment have his costs of and relating to the removal (to be taxed).

As to Common Pleas Judgments between November, 1875, and April, 1880.

Any office copy required may be made from the copy filed in the office and issued as an office copy of the

original judgment, unless there shall be some special reason against doing so, in which case the parties shall be referred to a practice master.

As to writs of attachment issued in pursuance of an order for making default in payment of a sum of money made in any case excepted by the 4th section of the Debtors Act, 1869, from the operation of that section, these should have a note stating that the writ does not authorize an imprisonment for any longer period than one year.

NOTE.—All questions of practice, sufficiency of affidavits, &c., are to be referred to a practice master, and not to any other master.

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